IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6997

SANDRA LOCKETT,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR PETITIONER

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OPINIONS BELOW

The majority and dissenting opinions of the Ohio Supreme Court are reported at 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976), and appear in the Appendix at A. 197. The opinion of the Court of Appeals, Ninth Judicial District, is unreported, and appears at A. 185.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

A timely petition for rehearing of the issues decided by the December 30, 1976, opinion and judgment of the Ohio Supreme Court was denied on January 28, 1977. The time within which a petition for certiorari might be filed was extended to June 27, 1977, by order of Mr. Justice Stewart. The petition for certiorari was filed on June 27, 1977, and granted on October 11, 1977. ____ U.S. ____, 46 U.S.L.W. 3238 (U.S.).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio Law:

> Ohio Rev. Code Ann. Sec. 2903.01 (Page 1975). *Aggravated murder.*
>
> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Rev. Code Ann. Sec. 2923.03 (Page 1975). *Complicity.*

(A) No person acting with the kind of culpability required for the commission of an offense, shall do any of the following:

* * *

(2) Aid or abet another in committing the offense.

* * *

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section or in terms of the principal offense.

Ohio Rev. Code Ann. Sec. 2929.02 (Page 1975). *Penalties for murder.*

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

* * *

Ohio Rev. Code Ann. Sec. 2929.03 (Page 1975). *Imposing sentence for a capital offense.*

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the

charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by a jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Ohio Rev. Code Ann. Sec. 2929.04 (Page 1975).
Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt.

(1) The offense was assassination of the president of the United States or person in line of succession to the presidency, or the governor or lieutenant governor of this state, or the president-elect or vice-president-elect of the United States, or the governor-elect or lieutenant-governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detention, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondance [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Ohio R. Crim. P. 11(C)(3) (Page 1975). *Pleas of guilty and no contest in felony cases.*

With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge

is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

QUESTIONS PRESENTED

1. Whether the prosecutor in summation made impermissible comments on petitioner's failure to testify and thereby violated her rights under the Fifth and Fourteenth Amendments.
2. Whether petitioner's sentence of death is constitutionally valid.
   a) Whether the Ohio death penalty statutes place unconstitutional limitations upon the consideration of mitigating circumstances.

b) Whether death is a disproportionately severe and unconstitutional sentence for one who has not taken life, attempted to take life, or actually intended to take life.

c) Whether the Ohio death penalty statutes violate the Sixth, Eighth and Fourteenth Amendments in that they deny the capitally accused the right to a judgment of his peers as to the existence of mitigating circumstances, and the appropriateness of the penalty of death.

d) Whether Ohio capital sentencing procedures impermissibly penalize exercise of the rights to plead not guilty and to trial by jury.

e) Whether Ohio capital sentencing procedures impermissibly shift to the defendant convicted of capital murder with specifications the risk of nonpersuasion in proving facts which distinguish those who may live from those who must die.

3. Whether the exclusion for cause of four veniremen on account of their conscientious and religious scruples against capital punishment violated petitioner's Sixth and Fourteenth Amendment rights.

4. Whether the Ohio Supreme Court, by giving retroactive application to a new construction of Ohio Revised Code Section 2923.03(A) governing complicity, denied petitioner's right to fair warning of a criminal prohibition and thereby deprived her of her life in violation of the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

On January 14, 1975, four people drove to downtown Akron and parked near a pawnshop. A.

48-49.[1] Two of them, Al Parker and Nathan Earl Dew, needed money to return to their home in New Jersey. A. 67. The remaining two were petitioner, a twenty-one year old black woman, A. 153, and her older brother James. Both were residents of Akron, A. 40, 75, who had met Parker and Dew on a visit to New Jersey. A. 30, 36. Dew had with him a ring with a pawnable value of $100. R. II 19.

Petitioner's brother and Dew entered the pawnship, and, as Dew was talking with the proprietor, Parker entered the shop. A. 49. Parker asked to see a pistol, A. 50, loaded it with bullets he had in his pocket, *ibid.*, and proceeded to announce a stickup, whereupon the proprietor grabbed the gun, causing it to fire. A. 50-51, 53, 57. Petitioner had not entered the shop.

The proprietor of the pawnshop, Sidney Cohen, died of a single gunshot wound. R. II 15, State's Exhibit 2. Al Parker, Nathan Earl Dew, petitioner and her brother were indicted for having murdered him in the course of an aggravated robbery.[2]

Parker, by all accounts the person holding the murder weapon at the time Mr. Cohen was killed, was to have been the first tried. The day before his scheduled trial, Parker pleaded guilty to the crime of aggravated murder "without specifications," *i.e.*, with-

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[1] Numbers preceded by "A." refer to pages of the Appendix; numbers preceded by "R. I" or "R. II" refer to transcript pages not reproduced in the Appendix.

[2] *State v. Parker*, Summit Co. Court of Common Pleas, Case No. 75-1-97; *State v. Dew*, Summit Co. Court of Common Pleas, Case No. 75-1-99; *State v. James Lockett*, Summit Co. Court of Common Pleas, Case No. 75-1-98; *State v. Sandra Lockett*, Summit Co. Court of Common Pleas, Case No. 75-1-96.

out the circumstances specified by Ohio Rev. Code Ann. Sec. 2929.04(A) as predicates for the penalty of death. He had been told by his lawyers that "in return," A. 65, he would be expected to testify against petitioner, her brother and Mr. Dew,[3] A. 66, and "to tell the truth," A. 60, 65. The remaining three were convicted of aggravated murder with one or more specifications.[4]

The conviction and death sentence of James Lockett was subsequently reversed by the Ohio Supreme Court because of the trial court's failure to permit defense counsel to use, for purposes of cross-examination and impeachment, a tape recorded statement made by

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[3]Parker did not testify against Nathan Dew. Dew made four statements to the police which were introduced at his trial. The first three were exculpatory as to James Lockett, Sandra Lockett and himself. *State v. Dew*, Summit Co. Court of Common Pleas, Case No. 75-1-99, R. 354-429. The fourth statement introduced at trial admitted a prior discussion of a pawnshop robbery with Al Parker outside the presence of James and Sandra Lockett. Dew related that at the time of the robbery, Sandra Lockett knew of Parker's plan and didn't want Parker to go through with it. When the car stopped near the pawnshop, Sandra Lockett told Dew not to go in but "I told her I was just going in and pawn the ring and get the hell out of there." *State v. Dew, supra* at R. 433. The night before the robbery, Sandra had objected to a robbery and told Parker that Dew was only going in to pawn the ring. *State v. Dew, supra*, at R. 435.

[4]Although Parker entered his plea before the trials of Nathan Dew, James Lockett and Sandra Lockett, he was not sentenced until April 10, 1975, after the convictions of his three co-defendants. *State v. Parker*, Summit Co. Court of Common Pleas, Case No. 75-1-97.

Parker in which Parker exonerated all of his co-defendants. This error was held prejudicial because "the state's case rested squarely on the shoulders and credibility of the co-defendant [Parker] . . ." *State v. James Lockett*, 48 Ohio St.2d 71, 76, 358 N.E.2d 1077, 1080 (1976).[5] James Lockett's retrial ended in a hung jury. After a third trial, he was convicted and sentenced to death. His appeal is presently pending.

Nathan Earl Dew was convicted but spared a sentence of death by a finding that his offense "was primarily the product of mental deficiency," one of the three mitigating circumstances recognized by Ohio Rev. Code Ann. Sec. 2929.04(B)(3).[6]

In the last of the trials involving the killing of Mr. Cohen, petitioner was convicted of aggravated murder with specifications, A. 127-28, and was sentenced to death by electrocution. A. 148.

I. The Trial of Guilt or Innocence

Al Parker, who was 25 years old, A. 25, had had five years of schooling in Sumter, South Carolina, *Ibid.*, had been convicted in New Jersey of burglary and possession of stolen property, A. 29, 67-68, had served

[5]There was no attempt by petitioner's court-appointed trial attorneys to introduce this impeaching statement at her trial.

[6]The trial court found "beyond any doubt . . . that he was a borderline mentally retarded person . . . [and] that the offense was primarily product of this mental deficiency." *State v. Dew*, Summit Co. Court of Common Pleas, Case No. 75-1-99, R. 256-57.

time for the former charge, A. 68, and was a fugitive on the latter charge, A. 69. He provided the only evidence tending to show that petitioner knew of or participated in plans to rob the pawnshop. He testified that the following conversation occurred on the day before the crime:

"Q Was the pawnshop ever discussed?

A The pawnshop, the first thing we was talking about pawning the ring.

Q Was it ever talked about robbing the pawnshop?

A Yes, sir.

Q What was said about robbing a pawnshop?

A Mr. James Lockett and Nathan Dew go in; I wait outside, then go in and get the gun to rob the pawnshop.

Q What did Sandra Lockett have to say about all this?

A She was to show us the pawnshop, but she had to stay in the car. That was her brother. She couldn't go in.

Q She knew the pawnshop operator, is that what you meant?

A Yes, sir.

Q Did you have any bullets on you at that particular point?

A Yes, sir.

Q Thursday night, Al, how was it determined who would go in and get the gun at the pawnshop?

A I was the one who had the bullets. Mr. James Lockett tell me what to do – go in and ask the man let me see the gun, drop two bullets in it.

Q What was Sandra supposed to do?

A She was sitting out in the car.

Q What was James Lockett and Nathan Earl Dew supposed to do?

A Mr. Dew and Mr. James Lockett supposed to go in and to get the man's attention like they are pawning a ring; and I was supposed to walk in behind them and ask him to let me see the gun; put the two bullets in it.

Q Now, did you ever ride by that particular pawnshop Tuesday night?

A Yes, sir.

Q Who was with you when you rode by?

A Me and Mr. Nathan Dew and Miss Sandra Lockett.

Q Was anything said by anybody when the three of you went by the pawnshop?

A Yes, sir.

Q What was that?

A Miss Sandra Lockett told us that's the pawnshop she's talking about."

A. 46-47. He also testified that at about noon the following day, A. 47, the co-defendants had another conversation:

> "Mr. James Lockett asked if we was still going to do it; Everybody said yeah. . . . Me, Mr. Dew, Miss Sandra Lockett say yeah."

A. 48. When they later drove "downtown" in Parker's car, with Parker driving and petitioner giving directions, *ibid.*, they

> "... went by the pawnshop two or three times ... when we get by, Miss Sandra Lockett said, that's the pawnshop."

A. 49. Asked whether he had "any conversations with the defendant Sandra" before leaving the car to go to the pawnshop, he said

> "I told her, like two minutes after we was gone to switch the car, to crank the car up."

Ibid.

The balance of Parker's testimony, and the remainder of the State's case against petitioner, concerned events following the shooting, and unrelated and tangentially related events that preceded it:

Mr. Cohen sounded an alarm after the shot, A. 51, and the three men fled, A. 52. Parker took the pistol with him. He got in his car, which he said was running, and drove off with petitioner. *Ibid.* Petitioner directed him to her aunt's home, and on the way he told her:

> "... I went in there, asked the man to let me see the gun; I put the two bullets in it and told him it was a holdup. I told him it was a holdup. He snatched the gun; the gun went off; he got hit."

A. 53.[7] Petitioner reportedly said nothing, but took the gun, which Parker had placed under the armrest, and put it in her pocketbook. *Ibid.* They stayed at the aunt's home "15 to 20 [minutes]; half hour at the most," and left in a taxi which petitioner had called. A. 54. Parker sat on the passenger side, petitioner, behind the driver. *Ibid.*

Petitioner gave directions to her home, A. 54, which, according to the testimony of the cab driver, involved a longer route than he would have taken and, unlike the

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[7] Parker consistently testified as to the unintentional nature of the shooting. A. 50-51, 53, 57.

route he would have taken, avoided the pawnshop, A. 85-86. Before they reached their destination, the taxi was stopped by a police cruiser, A. 54, at which point petitioner moved closer to Parker and "whispered . . . that the gun was under the seat," A. 55.[8] The taxi driver testified that two officers had sat with Parker in the cruiser for a time, after which one of them returned to the taxi to tell petitioner that they were taking Parker in for questioning and that "the man [Parker] wanted her to go with him," A. 84. At the station Parker said that he was from Chicago, and petitioner said that Parker was renting a room with her mother. A. 56. Police officers made a call to the Lockett household, and released both suspects. A. 56-57. Petitioner and Parker returned to the Lockett household where they met petitioner's brother and Dew. A. 56. Parker testified that at about ten o'clock that evening the police arrived, and petitioner hid him and Dew in the attic. A. 58. Parker later returned to the home of Joanne Baxter, the woman with whom he had been staying in Akron. *Ibid.* He was arrested there at about midnight. A. 59.

Testimony regarding the events leading up to the robbery included a recitation of the activities of the co-defendants and Baxter over a four day period, during which they stayed out all night at bars, A. 30-31, bailed petitioner's brother out of jail, A. 36, were fined for speeding, A. 39, talked about committing two unrelated robberies, A. 41-43, 72-73, took petitioner to a

[8]The gun was subsequently found under the driver's seat of the cab. A. 87.

Methadone Clinic, A. 41-42, and purchased and smoked marijuana, A. 44, 74, 79-80.[9]

Approximately two weeks before Miss Lockett's trial, the prosecutor offered her a plea of guilty to voluntary

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[9]Parker had met petitioner and Baxter in New Jersey where they were visiting petitioner's stepmother and stepsisters. A. 70-71, 78. They were in a bar on a Friday evening, and they and five or six other people were out together until 6:30 the following morning. A. 30-31. The next evening Parker, Baxter and petitioner went out together again. A. 32. Petitioner and Dew, whom she had met at the home of a friend of Parker, separated from the party; Parker, Baxter and two of Parker's friends stayed at a "Club" until it closed at 1:45, and then spent the night at a hotel. A. 33-34. On Sunday evening, Parker did not see petitioner or Dew, but he and Baxter went out drinking. A. 39. On Monday morning, the group went to Jersey City to get petitioner's brother out of jail. His arrest was unexplained except for the following testimony:

> "Q Now, before you got James Lockett out of jail had you ever had any conversation with the defendant here . . . about jail?
>
> A She told me that, 'Al, they was locked up in Jersey City.'
>
> Q What are you referring to?
>
> A Her, Mr. Nathan Dew, Mr. James Lockett."

A. 37. The group then drove to Akron, stopping to spend the night in a Pennsylvania Holiday Inn. A. 37-38. Each of the two cars they were driving was stopped for speeding and assessed a fifty dollar fine. A. 39. Both Parker and Baxter testified that on the Tuesday of their arrival in Arkon, R. II 46, petitioner discussed with Parker, Baxter and Dew the possibility of robbing two local businesses, A. 41, 43, 72, and, after making a stop at a methadone clinic, A. 42, 72, directed them to one of the proposed robbery targets, A. 43, 73. Neither robbery was attempted or carried out. Baxter was dropped off to make a purchase of marijuana, after which she, petitioner, Parker and Dew returned to the Lockett household. A. 44-45.

manslaughter. She refused. A. 197. Just prior to her trial, and again after the major portion of Al Parker's testimony, she was offered a plea of aggravated murder without specifications, with the understanding that the aggravated robbery charge and an outstanding forgery charge would be dismissed. Again she declined. R. I 71-73, A. 60-61. She insisted, against the advice of counsel, that her brother and James Earl Dew be called as witnesses in her behalf. A. 60-61, 94-95. Both men, following the advice of counsel, refused to testify on the ground that their testimony might incriminate them. A. 88-89, 95[10]

Petitioner did not take the stand. Initially, one of her defense attorneys stated in the presence of the jury that she would testify. A. 89. However, the court was subsequently informed outside the jury's presence that two apparent attempts by defense counsel to persuade petitioner to take the stand had been unsuccessful. A. 90-91, 96. Petitioner remained silent, acting on the advice of her mother, who expressed, on the record, her dissatisfaction that two attorneys whom she had sought to retain to represent her daughter had not been permitted by court-appointed defense counsel to take charge of and handle the case. A. 91-93.

During closing argument the prosecutor stated:

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[10]At this time, both James Lockett and Nathan Dew were awaiting mitigation hearings to determine whether they would be sentenced to death. *State v. Dew, supra*, mitigation hearing May 21, 1975; *State v. James Lockett, supra*, mitigation hearing May 2, 1975.

See note 3 *supra*, regarding the exculpatory nature of the prior statements of Nathan Dew to the police.

"What you heard with the State's witnesses, witnesses for the State of Ohio, is uncontradicted and unrefuted testimony by Al Parker, Joanne Baxter, Mrs. Garrett, Ronda Reed, the cab drivers involved. That's what you heard – uncontradicted, unrefuted evidence from the witness stand. That's what you must decide the case on, ladies and gentlemen." A. 109-10.

"Aggravated robbery? Did the crime occur, ladies and gentlemen? No doubt. Uncontradicted, unrefuted that there was an aggravated robbery. No evidence to the contrary.

"Aggravated murder? Did that occur? Unrefuted, uncontradicted testimony and evidence that an aggravated murder occurred." A. 110.

"Let's talk about the evidence. The evidence uncontradicted and unrefuted that shows that this women, this heroin addict participated in the crimes of aggravated robbery and aggravated murder." A. 111.

"Aid and abet, stays in the car; uncontradicted, unrefuted she's in the car." A. 112.

"If you think that the Prosecutor's Office of this County connives, tries to frame people, well then you turn her loose. She can walk right out of this courtroom; find her not guilty if that's what you think the people in the Prosecutor's Office and this State, this County are doing." A. 112-13.

"Is Al Parker believable? Every witness that came in here substantiated his story. Joanne Baxter, the cab drivers, Mrs. Garrett, Ronda Reed, everyone – uncontradicted, unrefuted evidence.

"Nothing. No evidence from the Defense. Forget about their opening statement. They didn't prove a

thing they said they were going to prove to you." A. 113.[11]

And the prosecutor's summation concluded:

> "She doesn't deserve any more than Sydney Cohen got. Common sense, ladies and gentlemen, common sense was a witness in this case just as much as any other. Common sense said that Sandra Lockett participated in the crime of aggravated robbery as an aider and abettor, which led to the death of Sydney Cohen.
>
> And human nature, ladies and gentlemen, the other silent witness in this case, said that she would try and get away with it.
>
> The people of this community, ladies and gentlemen, who you represent, await your verdict." A. 114.

The jury was admonished not to "discuss or consider the question of punishment," A. 115, and was told that: "In this particular case the defendant did not testify. It is not necessary that the defendant take the stand in her own defense. She has a constitutional right not to testify. The fact that she did not testify cannot and must not be considered for any purpose." A. 118. The jury was further instructed that petitioner could be found to have killed purposely if she was found to have been involved in a conspiracy to rob by force:

> "A person engaged in a common design with others to rob by force and violence an individual or individuals of their property is presumed to

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[11]The opening statement for the defense had repeatedly stressed that Miss Lockett personally knew nothing of the robbery attempt, and had thought that the other three men were merely entering the pawnshop to pawn the ring. A. 24, 25.

> acquiesce in whatever may reasonably be necessary to accomplish the object of their enterprise. And if under the circumstances it may be reasonably expected that the victim's life would be in danger by the manner and means of performing the criminal act inspired, each one engaged in the common design is bound by the consequences naturally or probably arising in its furtherance.
>
> If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in homicide, even though the aider and abettor was not aware of the particular weapon used to accomplish the killing. An intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt under such circumstances."

A. 118-19.

The jury deliberated for more than nine hours, A. 126, 127, before finding petitioner guilty of aggravated murder, "committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense," and "committed while . . . committing or attempting to commit, or fleeing immediately after committing or attempting to commit . . . aggravated robbery," and guilty of aggravated robbery, A. 127-28.

Trial counsel argued that a fair trial had been precluded by petitioner's lack of confidence in her attorneys and her domination by [illegible] motives and moved for a new trial. A. 132-39. The motion was denied. A. 139.

II. Death Qualification of The Jury

On voir dire examination, the prosecutor had proceeded to death-qualify the jury. He asked "... because there is a possibility of capital punishment we must ask this question and that is, does anyone here have an abiding conviction that is so strong against capital punishment that they could not sit, listen to the evidence, listen to the law, make their determination solely upon the evidence and the law without considering the fact that capital punishment is only a possibility in this case?" A. 9. He also inquired whether any venire members, "realizing that there's a possibility [of a death sentence] have any qualms whatsoever about fairly and impartially deciding this case on the evidence as you hear it and the law as the Judge instructs you." *Ibid.*[12] The trial court quickly took control of the voir dire examination, A. 10,[13] and after

[12]Earlier, the prosecutor had emphasized repeatedly that death was only a possibility because Judge Barbuto would make the final decision as to punishment. A. 6, 8-9. Thus, the jury was left free to believe that if it found petitioner guilty, she would receive mercy because her role was relatively minor. The jury was not informed that, under Ohio's death penalty statute, the "mitigating circumstances" that can save a convicted defendant's life are severely limited.

[13]"*COURT*: Let me pursue this since the doors [sic] been open, and I'm addressing myself to Jerry Smith, Minnie Lee, Betty Tomaselli, Barbara Barton, Dorothy Tiell, and Elizabeth –

MRS. BARTON: My name is Barbara Barton. I didn't say anything about capital punishment.

COURT: Alright. Dorothy Tiell. Those of you who have expressed a strong feeling in regard to capital punishment, the Court would like to ask you this. Those of you who have responded, do you feel that you could take an oath

(continued)

(footnote continued from preceding page)

to well and truely [sic] try this case because you have to take an oath if you were selected as jurors in this particular case, could you take an oath and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment? Now, I will ask each and every one of you that. Jerry Smith, could you take the oath?

MR. SMITH: No.

COURT: You could not take an oath in this particular case because of your religious conviction?

MR. SMITH: (Nods head).

COURT: Your conviction?

MR. SMITH: I just don't believe in capital punishment.

COURT: Therefore you could not and would not take an oath, is that what you are telling the Court?

MR. SMITH: Right.

COURT: Minnie Lee?

MRS. LEE: Yes.

COURT: Could you take an oath in this case because of your convictions in relation to capital punishment?

MRS. LEE: I wouldn't like to because I don't believe in capital punishment.

COURT: Well my question is, would you and could you take an oath and would you follow your oath?

MRS. LEE: If I took it, I'd follow it but I wouldn't want to take it, not with capital punishment.

COURT: I still have to ask you directly, Minnie, would you take the oath, now that you know the situation?

MRS. LEE: No.

COURT: You would not take the oath?

MRS. LEE: No.

COURT: Alright. Betty Tomaselli?

MRS. TOMASELLI: I would not.

COURT: You would not take the oath?

(continued)

(footnote continued from preceding page)

MRS. TOMASELLI: No, I would not.

COURT: Dorothy Tiell, would you take the oath?

MRS. TIELL: Yes, I would take it.

COURT: Alright. Elizabeth Yakubik.

MRS. YAKUBIK: No, I would not.

COURT: You would not take the oath?

MRS. YAKUBIK: No.

COURT: Mr. Bayer, would you like to ask any questions? Have I covered every individual that has expressed themselves in relation to capital punishment, who are opposed to capital punishment? I have addressed myself to each and every one of you? Mr. Bayer, would you make further inquiry of these prospective jurors?

MR. BAYER: No, I don't think so, your Honor. You mean the five that would not or could not take the oath?

COURT: Yes.

MR. BAYER: No, I have no questions.

MR. RUDGERS: He has no objections to excusing them?

MR. BAYER: I have no objections.

MR. RUDGERS: State would move to excuse those jurors who just were examined and who have said they would not take the oath.

COURT: Yes. The Court will excuse Jerry Smith, Minnie Lee, Betty Tomaselli, Elizabeth Yakubik. The reason why you are being excused, you must take an oath or affirm in a criminal case, in a case to well and truely [sic] try the case. Let me ask you this. I didn't use the word affirm. Would any of you affirm to well and truely [sic] try this case? Jerry?

MR. SMITH: No.

COURT: You would not?

MR. SMITH: (Shakes head).

COURT: Minnie?

MRS. LEE: No.

(continued)

a brief inquiry by the judge, four jurors were excused for cause. A. 12[14]

(footnote continued from preceding page)

COURT: She would not. Betty Tomaselli?

MRS. TOMASELLI: No.

COURT: She would not. Elizabeth?

MRS. YAKUBIK: No.

COURT: She would not.

MR. RUDGERS: The State would renew it's [sic] motion.

COURT: Alright. Thank you. I want to thank each and every one of you for being very honest with the Court and with the parties to this action because you must take an oath or affirm, either one. Since you feel that you cannot and will not, and I am expressing myself, that you feel you will not take the oath knowing the possibility here the Court will excuse you for cause. Would you kindly report back to the Jury Commissioner, please? She will excuse you from there. There's some formalities you have to comply with. Thank you very much."

A. 10-12.

[14]The court's subsequent examination of prospective jurors who admitted to potential bias, because of extensive newspaper publicity about the crime, was somewhat more detailed:

MR. JOHNSTONE [Defense Counsel]: . . . do you think you would be affected so that you could not approach this as an impartial juror? No matter where your prejudice might be, if you had any, either for or against the State or for or against the defendant?

MRS. TRUBY: I don't think I could.

MR. JOHNSTONE: You think you could not –

MRS. TRUBY: (Shakes head.)

MR. JOHNSTONE: – approach this in an impartial manner?

MRS. TRUBY: (Shakes head.)

(continued)

At the time of this death-qualification, only one of the two appointed attorneys for Sandra Lockett was present in the courtroom. He did not question or object to the dismissal of jurors who had scruples against capital punishment. The defense attorney who conducted most of the voir dire examination appeared

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(footnote continued from preceding page)

COURT: Do you feel that you could listen to the evidence in this particular case and decide this case not other cases, fairly and impartially?

MRS. TRUBY: Not with all that I have read about it in the papers and such. It's bound to affect you.

COURT: Well, it may affect you. I didn't ask you that, how it affected you. I asked you whether or not you could set it aside?

MRS. TRUBY: I said I hope I could.

COURT: That's all the Court is asking you. Can you do that? That's all you are required. Nobody is perfect, in spite of some of the questions they try to make you perfect. You are all human, and you have human reaction. The most important thing is you have to adopt the one principle that everybody comes into the courtroom, and under our laws, is innocent, not presumed to be innocent like they are saying, but is innocent as far as this Court is concerned. Would you accept that principle?

MRS. TRUBY: I accept that principle.

COURT: And would you decide this case, State of Ohio vs Sandra Lockett, not anybody else, on the evidence that you hear from this witness stand, not from any other outside sources whatsoever? Could you do that and would you do that?

MRS. TRUBY: I would certainly try.

COURT: All right. I will not excuse her.

A. 16-17.

later, R. I 32,[15] and entered an objection to the dismissal of the death-scrupled jurors. A. 12-13.

III. The Penalty Phase

After denying petitioner's motion for a new trial, A. 139, the trial judge conducted the penalty proceeding provided by Ohio Rev. Code Ann. Sec. 2929.03(C)-(E).

No testimony was offered during this proceeding. The judgment of the court was based upon four written professional reports (two by psychiatrists and two by psychologists), a pre-sentence report, reports from the Akron Drug Abuse Clinic, and arguments of counsel. All of the documents, with the exception of the Clinic reports, were State's Exhibits, and were admitted upon

[15]He had apparently been in another courtroom on another case. A. 15.

stipulation.[16] A. 130-31. 140. The psychiatric experts had been instructed by the trial court that "[t]he one

[16]Apparently, defense counsel did not consult with petitioner or review the reports with her prior to the mitigation hearing. The court inquired of the defendant:

> "*COURT*: Before we get to the motion for a new trial, Sandra Lockett, have you consulted with your Attorneys in relation to these reports that we have just been discussing?
>
> *DEFENDANT*: No.
>
> *COURT*: You have not?
>
> *DEFENDANT*: No.
>
> *COURT*: Do you concur with their position in regard to stipulating these documents?
>
> *DEFENDANT*: Uh huh.
>
> *COURT*: I can't hear you?
>
> *DEFENDANT*: Yes.
>
> *COURT*: You do? In other words, what the Court wants to say to 'you before you answer. The Court says to you that you have the right to have these people that we are talking about, Dr. Villalba, Dr. Gunter, Dr. Hungerman, Daniel Reinhold, and Mrs. Denton appear personally and testify. You have the right to cross examine them in regard to their testimony, if you so desire; or as suggested here by the Prosecutor and your Attorneys, that you will stipulate, you will agree that this is what they would testify to and there's no need for cross examination. Is that what you are saying?
>
> *DEFENDANT*: Yes.
>
> *COURT*: Do you understand what the Court has said?
>
> *DEFENDANT*: Yes.
>
> *COURT*: Is there any question that you want to ask the Court in regard to this?
>
> *DEFENDANT*: No.
>
> *COURT*: Okay. The Court will accept it."

A. 131-32.

question to be considered in this case at this point is whether or not the Defendant has a mental deficiency." A. 158, 162. Both psychiatric reports concluded that petitioner suffered no psychosis or mental deficiency. A. 161, 166. Neither of these brief reports contained anything negative about petitioner's life or character. A. 159-61, 164-65.

The psychological reports were more comprehensive. One concluded that petitioner:

> "...gave no indications of being a seriously disturbed individual or even one who could be described as an inadequate personality. She does employ the defense of denial, and much of her response seem to have a pollyanna effect."

A. 157. The other reported that she was of low-average intelligence, and summarized her personality as follows:

> "The results portray Sandra as friendly, well socialized, optimistic, sensitive, honest, sincere, good humored, rational, good emotional affect, and honestly aware of herself.
>
> The only measured flaws were the negative feelings [against her brother and Al Parker], a carelessly optimistic outlook, a tendency to be simplistic as opposed to insightful, and a lack of inclination to accurately assess the negative implications of a negative situation – in her mind things always turn out good."

A. 151. The report concluded with the following evaluation:

> "It may easily be hypothesized that if Sandra were from a different socio-economic background, she would never have had difficulty with the law.
>
> In her own words her problems may exist to a large degree because 'I'm just too nice.'

The dominant theme in her personality seems to be a need to nurture others. She wants to be kind, happy, loving, and supportive. She doesn't want disagreement, discord, anger, hurt, or unnecessary pain in her relationships with others. Her defense mechanisms seem to turn difficulties into hopeful optimism, failure into acceptance, destructive hurt into denial, and disaster into disassociation from pain accompanied by a rationalized optimism. The 'Pollyanna' outlook might summarize this dynamic.

Her intelligence is adequate to deal with this society. However, it may be hypothesized that her need to avoid pain has resulted in a handicap. She is deficient in her ability to generalize concepts, and to perceptually organize visual material. That suggests that there is a possibility of organic [*sic*] deficiency. It also suggests that Sandra would probably not be aware of the predicted ramifications and consequences of some verbally presented concepts. She tends to deal best with simple, familiar ideas.

Unfortunately, considering her situation, this condition is probably not a mental deficiency. Rather, it is a handicap which may hinder her functioning in some situations until she can compensate for the handicap.

Also, the evaluation doesn't support the presence of a deficiency based on emotional or personality factors.

In her favor, it should be noted that Sandra's contention that she did not participate in a plan to murder anyone is very supportable. Her personality structure not only is unlikely to result in unnecessary anger or violence, but is in fact oriented against acting out or hurting. It is very easy to picture her discouraging any wrong doing which would hurt anyone, especially someone she

> cares about. It is easy to believe, for example, that she would not want her friends to rob a store.
>
> Finally, if she is to be returned to society, her prognosis for rehabilitation is very favorable. At present there is no special program which would seem to be needed."

A. 151-52.

The pre-sentence report, prepared by a probation officer, offered an "impression" in agreement with one of the psychiatrists that petitioner was not suffering from a psychosis, mental defect or mental deficiency. A. 181. The report also reflects petitioner's record of prior criminal convictions, consisting of petit larceny in 1971 (30 days suspended sentence and $25 fine) and resisting an officer in 1972 ($25 fine). A. 174.

The Drug Clinic reports included the following summary by petitioner's counselor:

> "Sandra was admitted to this clinic on May 29, 1974 at which time she was gainfully employed by Chrysler Corporation in Twinsburg. During her stay in this clinic I met with Sandra on the average of two to three times a week serving as her counselor. Our counseling sessions were focused mainly on her personal problems, and she seemed to be very sincere about becoming drug free, and getting ahead in life. I didn't have trouble with her keeping our counseling appointments, and her overall attitude and general conduct in, and about the clinic were good.
>
> In my opinion and observations Sandra was on the road to success as far as her drug problem was concerned."

A. 183.

Defense counsel noted petitioner's marijuana and methadone use and urged that petitioner's offense was the product of a mental deficiency:

"I respectfully submit, Your Honor, that you would not be tainting or corrupting our concept of justice by finding that Sandra Lockett is one of that class of persons that the legislature has said in that statute should not be sentenced to the electric chair.

Now I am very jealous of my reputation. I do not believe in the seizing upon all of the technicalities which have unfortunately in my opinion grown up in our present body of law concerning the protection of people accused of crime. But I do believe that when the legislature itself, probably when they passed the law having in their mind, their collective mind, some reservation about the morality of capital punishment provided an out that that provision should be liberally interpreted for the benefit of the accused."

A. 145.

Although the State had presented in its closing to the jury the argment – foreign to the record – that the motive for petitioner's crime was her "admitted" heroin addiction, A. 112, the prosecutor responded:

"I would agree that she probably has been on Methadone. There's no question about that. No question she might have been on heroin at one time or another. I don't think there's any way of knowing even from those reports whether she had any drugs – we have to assume she didn't – I am saying extra drugs the day this happened."

A. 147.

The findings and judgment of the trial court were as follows:

"The Court finds that the evidence is overwhelming in that there was no mental deficiency or no psychosis – this was not the primary

product of psychosis or mental deficiency as required by the law. Therefore, the Court has no alternative, whether the Court likes the law or not, the Court has to enforce the law as he sees it and he interprets it, and the Court will do so. . . .

Therefore, it's the order of this Court conforming to the verdict of the jury, that you be taken to the Summit County Jail, and there safely kept and within 30 days to be conveyed by the Sheriff of Summit County to the proper institution, and within the walls therein and within a certain enclosure prepared for this purpose, and under the direction of the Warden you shall be put to death on September 5, 1975, having a current of electricity of sufficient intensity to cause the death to pass through your body. . . ."

A. 148.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In her brief before the Ohio Supreme Court, petitioner asserted that her Fifth and Fourteenth Amendment privilege against self-incrimination was violated by the prosecutor's improper comments to the jury on her failure to testify. Brief of Defendant-Appellant, Ohio Supreme Court, pp. 70-73. The Ohio Supreme Court held that the statements in issue did not constitute a comment by the prosecutor upon the failure of the defendant to testify. *State v. Lockett*, 49 Ohio St.2d 48, 65, 358 N.E.2d 1062, 1073-74 (1976); A. 211.

Petitioner's contentions that the death sentence imposed upon her pursuant to Ohio law was a cruel and

unusual punishment forbidden by the Eighth Amendment were overruled on the merits. *State v. Lockett, supra,* 49 Ohio St.2d at 63, 358 N.E.2d at 1073; A. 209-10.

Petitioner's submissions that the death-qualification of her trial jury violated the Sixth Amendment and the requirements of *Witherspoon v. Illinois,* 391 U.S. 510 (1968), were also rejected on the merits. *State v. Lockett, supra,* 49 Ohio St.2d at 55-57, 358 N.E.2d at 1068-69; A. 201-04.

Petitioner's due process claim involving a denial of the right of fair warning of a criminal prohibition results from the Ohio Supreme Court's unforeseeable interpretation in this case of Ohio's new complicity statute, Ohio Rev. Code §2923.03(A)(2) (Page 1975). *State v. Lockett, supra,* 49 Ohio St.2d at 58-62, 358 N.E.2d at 1071-72; A. 204-07. In the opinions below, the scope of criminal culpability created by the statute was vigorously contested, the dissent maintaining that the majority had ignored the statute's clear meaning. *State v. Lockett, supra,* 49 Ohio St.2d at 67-71, 358 N.E.2d at 1075-77; A. 216.

SUMMARY OF ARGUMENT

I.

The summation for the prosecution contained numerous references to petitioner's failure to testify. Through a barrage of thinly-disguised indirect comments, any one of which alone might not appear prejudicial, the prosecutors made the absence of testimony from Sandra Lockett herself one of the

principal, recurrent themes of the summation. These prosecutorial tactics cannot withstand scrutiny under this Court's decision in *Griffin v. California*, 380 U.S. 609 (1965). And the Ohio Supreme Court, by rigidly holding that anything short of a "direct comment" on the defendant's failure to testify is permissible, has allowed the prosecution to make a mockery of this Court's *Griffin* holding safeguarding the Fifth and Fourteenth Amendment right of a defendant not to testify.

II.

Sandra Lockett's sentence of death is constitutionally invalid on several grounds. First, Ohio's death sentencing statutes severely limit the consideration of mitigating circumstances and in this case precluded consideration at sentencing of numerous mitigating factors relevant to both Sandra Lockett's character and the nature of her offense. Second, the imposition of the sentence of death upon this young woman, who was merely sitting outside in the robbery getaway car during the shooting (which itself was unintentional), and who personally never killed, attempted to kill or intended to kill, is unconstitutional because it is grossly disproportionate to the offense. Third, Ohio's death sentencing statutes totally strip the jury of any input at the sentencing phase, and thus denied Sandra Lockett the judgment of her peers as to whether she should be spared or put to death. Fourth, Ohio's statutes and court rules impermissibly penalized petitioner for exercising her constitutional rights to plead not guilty

and to be tried by a jury. And finally, Ohio's statutory scheme shifted to petitioner the risk of non-persuasion in proving facts upon which her life depended.

The procedures and circumstances described above violated the Fifth, Sixth and Fourteenth Amendments, and failed to provide a constitutionally adequate basis for Ohio's determination to take the life of Sandra Lockett.

III.

During selection of the jury that decided the question of petitioner's guilt or innocence, four venire members were excluded for cause because of their conscientious and religious scruples against the death penalty. They were stricken after only the most perfunctory examination of their ability to try the issue of guilt or innocence fairly and impartially, an examination that fell far short of the inquiry required by this Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Accordingly, petitioner's Sixth and Fourteenth Amendment right to a jury selected from a cross-section of the community, guaranteed by *Witherspoon* and *Taylor v. Louisiana*, 419 U.S. 522 (1975), was violated.

IV.

The Ohio Supreme Court affirmed petitioner's conviction for aggravated murder by construing Ohio's new complicity statute in a manner contrary to its plain meaning and the Ohio Legislature's intent in enacting it.

By so doing, the court denied petitioner fair warning of the criminal prohibition for which she was convicted and sentenced to die, in violation of the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

I.

THE PROSECUTOR IN SUMMATION MADE IMPERMISSIBLE COMMENTS ON PETITIONER'S FAILURE TO TESTIFY AND THEREBY VIOLATED HER RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

In *Griffin v. California*, 380 U.S. 609, 615 (1965), this Court held that "the Fifth Amendment, . . . in its bearing on the States by reason of the Fourteenth Amendment, forbids . . . comment by the prosecution on the accused's silence." *See also O'Connor v. Ohio*, 385 U.S. 609 (1965); *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1976) (dictum). *Cf. Doyle v. Ohio*, 426 U.S. 610, 617-619 (1976). Deviously but indisputably, that prohibition was flouted at petitioner's trial. Under the circumstances of this case, the prosecutors' incessant albeit indirect references in closing argument to petitioner's failure to testify twisted Sandra Lockett's silence into evidence against her. They therefore violated her Fifth Amendment privilege.

The jury's attention was early and sharply focused on whether petitioner would testify in her own defense. At the close of the State's case, one of petitioner's attorneys (Mr. Bayer) declared in the presence of the

jury: "Your Honor, the next witness, I feel Mr. Max Johnstone [petitioner's other defense attorney] wanted to call was Sandra [petitioner]. I would ask to be recessed until Max gets here. He wanted to examine her." A. 89. The jury was excused and, in its absence, petitioner conferred with her mother and declined to testify. A. 89-93. The record is unclear whether petitioner had ever told her counsel that she was willing to take the stand.[17] However this may be, defense counsel's expressed intention to call her to the stand was not fulfilled. Petitioner's two co-defendants, James Lockett and Nathan Dew, were both called by the defense and, after answering a few preliminary questions, claimed their Fifth Amendment right to silence when questioned about the killing of Sidney Cohen. A. 88-89, 95. Petitioner presented no other evidence.

The State's closing argument rang the changes on the meaning of petitioner's silence, although her failure to testify was noted in a staccato of thinly-disguised euphemisms and code words. Mr. Shoemaker, for the prosecution, began by emphasizing that "the State has

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[17]During his argument on petitioner's new trial motion, Mr. Johnstone declared:

> "this record in this case is replete with the efforts of counsel to get Miss Lockett to take the stand. It's also replete with her refusal to take the stand. At that time I was under the impression that that was solely due to the dominance of Sandra Lockett by her mother and possible others, and that she was influenced by them, and by reason of that did not take the stand in her defense."

A. 135. *But see* A. 90 (where Mr. Johnstone states that petitioner had declared to him her willingness to take the stand).

fulfilled its promises. It has. I told you who you would hear from. I told you basically what the tenor of their testimony would be." A. 98. He then adverted to the case for the defense: "Now let's look at [our] . . . opening statement. Certain promises were made. I think we fulfilled them. Mr. Johnstone [petitioner's counsel] made some promises. I will go into those later on, as to whether or not he fulfilled those." *Ibid.* In the final summation for the State, Mr. Rudgers declared that his task of rebutting the defense case was difficult because "[t]hey haven't presented anything to rebut." A. 109. He continued that:

> "What you heard with the States' witnesses, witnesses for the State of Ohio, is uncontradicted and unrefuted testimony by Al Parker, Joanne Baxter, Mrs. Garrett, Ronda Reed, the cab drivers involved. That's what you heard – uncontradicted, unrefuted evidence from the witness stand. That's what you must decide the case on, ladies and gentlemen."

A. 109-110.

> "Aggravated robbery? Did the crime occur, ladies and gentlemen? No doubt. Uncontradicted, unrefuted that there was an aggravated robbery. No evidence to the contrary.
>
> Aggravated murder? Did that occur? Unrefuted, uncontradicted testimony and evidence that an aggravated murder occurred?

A. 110.

> "Let's talk about the evidence. The evidence uncontradicted and unrefuted that shows that this woman, this heroin addict participated in the crimes of aggravated robbery and aggravated murder."

A. 111.

"Aid and abet, stays in the car; uncontradicted, unrefuted she's in the car."

A. 112.

"Is Al Parker believable? Every witness that came in here substantiated his story. Joanne Baxter, the cab drivers, Mrs. Garrett, Ronda Reed, everyone – uncontradicted, unrefuted evidence.

Nothing. No evidence from the Defense. Forget about their opening statement. They didn't prove a thing they said they were going to prove to you."

A. 113.

"She doesn't deserve any more than Sidney Cohen got. Common sense, ladies and gentlemen, common sense was a witness in this case just as much as any other. Common sense said that Sandra Lockett participated in the crime of aggravated robbery as an aider and abettor, which led to the death of Sydney Cohen.

"And human nature, ladies and gentlemen, the other silent witness in this case, said that she would try and get away with it."[18]

A. 114.

The trial court subsequently charged the jury that:

"[in] this particular case the defendant did not testify. It is not necessary that the defendant take the stand in her own defense. She has a constitutional right not to testify. The fact that she did not testify cannot and must not be considered for any purpose."

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[18]In context, the first "silent witness" may be either to Ms. Lockett, the deceased, or "common sense."

A. 118.

Although defense counsel had taken no objections to the prosecution's summation, the Ohio Supreme Court entertained her Fifth Amendment contention on the merits and rejected it:

> "Our examination of the record fails to reveal any inflammatory statements or conduct prejudicial to the rights of appellant. The statements made by the prosecutor to the effect that the evidence against appellant was uncontradicted and unrefuted does not constitute a comment by the prosecutor upon the failure of the defendant to testify, prejudicial to appellant's right to a fair trial."

State v. Lockett, supra, 49 Ohio St.2d at 65; 358 N.E.2d at 1073-1074; A. 211. This conclusion apparently rested on Ohio's rule that "the *Griffin* holding . . . prohibit[s] only direct comment upon the accused's failure to testify," *State v. Lane,* 49 Ohio St.2d 77, 358 N.E.2d 1081, 1089 (1977).

The "direct comment" test for *Griffin* violations has been rejected by all of the federal courts of appeal and by a large number of state supreme courts,[19] and

[19] *See United States v. Flannery*, 451 F.2d 880, 881-882 (CA1 1971); *Desmond v. United States*, 345 F.2d 225, 226-227 (CA1 1965); *United States ex rel. Leake v. Follette*, 418 F.2d 1266, 1268 (CA3 1969) (prosecutor may do nothing whatsoever to "point a finger at the accused's remaining silent in the courtroom"); *United States v. Marcus*, 401 F.2d 563, 566-567 (CA2 1968); *United States v. Adamo*, 534 F.2d 31, 40 (CA3 1976); *United States v. Chaney*, 446 F.2d 571, 576 (CA3 1971); *United States v. Williams*, 479 F.2d 1138, 1140 (CA4 1973); *United States v. Weems*, 398 F.2d 274, 276 (CA4 1968); *United States v. Warren*, 550 F.2d 219, 227 (CA5 1977); *United States v. White*, 444 F.2d 1274, 1278 (CA5 1971); *United States v.*

(continued)

properly so. Its simplistic rigidity ignores realities that jurors do not, and lends itself to disingenuous evasions of a basic constitutional command. If *Griffin* is not to be made a laughingstock, the proper test must be – as the lower federal courts have widely held that it is –

> " 'whether the language used [by the prosecutor] was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' "

United States v. Walton, 552 F.2d 1354, 1362 (CA 10), *cert. denied*, ____ U.S. ____, 97 S.Ct. 2685 (1977). For:

> "[p]rejudicial argument is not confined to instances where the government states explicitly 'one way or the other about the defendant not testifying' . . . Neither is prejudice limited to instances where precise or certain words or phrases are used. If what was said in argument could reasonably be taken as comment upon [defendant's] right not to testify and thus used to

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(footnote continued from preceding page)
Smith, 500 F.2d 293, 297 (CA6 1974); *United States v. Handman*, 447 F.2d 853, 855 (CA7 1971); *United States v. Lyon*, 397 F.2d 505, 509 (CA7 1968); *United States v. Sanders*, 547 F.2d 1037, 1042 (CA8 1976); *United States v. Tanner*, 401 F.2d 281, 289 (CA8 1968); *Hayes v. United States*, 368 F.2d 814, 816 (CA9 1966); *United States v. Walton*, 552 F.2d 1354, 1362 (CA10 1977); *Bowles v. United States*, 439 F.2d 536, 542 (CADC 1970). *See also, e.g., State v. Dent*, 51 N.J. 428, 241 A.2d 833, 835 (1968); *Commonwealth v. Davis*, 452 Pa. 171, 305 A.2d 715, 718-719 (1973); *State v. Sherman*, 317 A.2d 445, 449 (R.I., 1974); *Rowley v. State*, 259 Ind. 209, 285 N.E.2d 646, 647-648 (1972); *State v. Nelson*, 234 N.W.2d 368, 370 (Iowa, 1975).

> support [a prosecution witness'] credibility, the argument is improper."

United States v. Handman, 447 F.2d 853, 855 (CA 7 1971). " 'The inquiry . . . must . . . be . . . in the view of the whole record the impression conveyed to the minds of the jurors.' " *United States v. Smith*, 500 F.2d 293, 297 (CA 6 1974).

For several reasons, the impact of the prosecutors' remarks here was to focus the jury's attention impermissibly upon petitioner's silence.

First, the evidence linking petitioner to the planning of the pawnshop robbery was by no means overwhelming. This was not a case where petitioner found herself "facing a demonstration of Euclidean inevitability," *United States v. Rodriquez*, 556 F.2d 638, 642 (CA 2 1977), and where the prosecutor merely said so. Particularly in view of the State's heavy reliance on the testimony of the alleged co-conspirator Parker, the prosecution sought and gained a significant tactial advantage by contrasting Parker's evidence with petitioner's silence and her failure to deny personally the truth of Parker's testimony.[20]

Second, the prosecutor's allusions to petitioner's failure to testify were not a mere isolated reference or extemporaneous aside, but rather formed the theme of the State's summation. The joined words "uncontradicted" and "unrefuted" occur seven times in quick

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[20]For the same reason, assuming these prosecutorial comments to have been error, there is no question but that " 'there is a reasonable possibility that the [error] . . . complained of might have contributed to the conviction.' " *Chapman v. California*, 386 U.S. 18, 23 (1967).

succession in the closing argument, and were capped by the clincher: "Nothing. No evidence from the Defense . . . They didn't prove a thing they said they were going to prove to you." A. 113. Taken as a whole, the State's argument is a palpable attempt to capitalize on the Ohio Supreme Court's "direct comment" construction of *Griffin*, and to approach as close as indirection will permit to the forbidden goal of saying outright that the defendant didn't testify. A strictly technical construction of each individual comment might perhaps render each, in isolation, merely ambiguous. But massed together as they were, they could not fail to direct a lay jury's attention ineluctably to the damning implication of petitioner's refusal to take the stand and personally contradict Al Parker's testimony.

Finally, while a prosecutor's use of terms such as "unrefuted," "uncontradicted," "unimpeached," and "undeniable" may sometimes be mere characterizations of the State's evidence, the repeated use of "uncontradicted, unrefuted" in the particular circumstances of this case pointedly called attention to petitioner in contrast to the State's witnesses.

> "[T]o say that the government witnesses' testimony was uncontradicted is [not] simply a statement of historical fact. There are many 'facts' which are benign in themselves. The difficulty is that such reference, when only the defendant could have contradicted [the prosecution's case], . . . clearly calls to the jury's mind the fact that he failed to testify."

United States v. Flannery, 451 F.2d 880, 881-882 (CA1 1971).[21] Here, the jury was acutely aware that

[21]Convictions have not infrequently been reversed because of the use of the word "uncontradicted" in closing argument by the prosecutor. *See, e.g., Rodriquez-Sandoval v. United States*, 409 F.2d 529 (CA1 1969); *Desmond v. United States*, 345 F.2d 225 (CA1 1965); *Barnes v. United States*, 8 F.2d 832 (CA8 1925); *Linden v. United States*, 296 F.104 (CA3 1924). Courts have often admonished prosecutors against the use of such language:

> "A prosecutor who refers to the evidence as 'undenied' when the defendant has not taken the stand exposes his case to the possibility of reversible error and necessarily calls into play a more searching review of the evidence on appeal that would otherwise be required.... In this case, as in most cases which have been diligently prepared and competently tried, the risk is simply not worth the candle and is increasingly likely to offend the conscience of the court."

United States v. Sanders, 547 F.2d 1037, 1043 (CA8 1976).

> "It is sufficient to say that when a defendant has not testified a prosecutor risks reversal by arguing that evidence is undisputed when the evidence was of a kind that could have been disputed by the defendant if he had chosen to testify. While there may be cases in which such an argument can be defended,... it will usually be rash for the prosecutor to predict that his is such a case."

United States v. Fearns, 501 F.2d 486, 490 (CA7 1974). The Court of Appeals for the Fourth Circuit has enjoined prosecutors to "observe the spirit of *Griffin* and... avoid jeopardizing otherwise certain convictions by arguments that border on forbidden ground." *United States v. Williams*, 479 F.2d 1138, 1141 (CA 1973); *see also United States v. Weems*, 398 F.2d 274, 275-276 (CA4 1968). And the Court of Appeals for the First Circuit has adopted a "prophylactic rule" declaring that prosecutorial use of the word "uncontradicted" in a case where the defendant does not testify is *per se* reversible error. *See United States v. Flannery*, 451 F.2d 880, 882 (CA1 1971); *United States v. Medina*, 455 F.2d 209, 211 (CA1 1971).

petitioner had elected not to take the stand, due to the unfortunate and mistaken representation of defense counsel that she would testify. That was not the State's doing, but neither was it fair game for the State's exploitation. Ohio has correctly conceded in this Court that when a defendant is the only person who could "refute" or "contradict" particular evidence introduced by the prosecution, use of such terminology by the prosecutor is likely to be found "prejudicial error."[22] That principle plainly governs the present case. For by the time the jurors heard prosecuting attorney Rudgers declare Al Parker's testimony to be "uncontradicted, unrefuted evidence," A. 113, they had already heard the only two witnesses other than petitioner who could directly impugn Parker claim their Fifth Amendment right to silence. Obviously, "a witness who stands upon his constitutional rights is, as a practical proposition, just as fully unavailable as though he were insane or dead." *Moore v. Metropolitan Life Ins. Co.*, 237 S.W.2d 210, 212 (Mo. App. 1951). *See* Fed. R. Evid.804(a)(1). Thus petitioner was in fact the only person who could effectively contravene Parker's account of the planning and execution of the pawnshop robbery. As the Court of Appeals for the First Circuit pointed out in a similar context, there is no:

> "doubt that the government's statement that its witness' statement stood 'unimpeached and uncontradicted' constituted improper comment. No one but appellant (*or his co-defendant, whom appellant*

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[22]*See* Brief for State of Ohio in Opposition to Petition for Certiorari, *Lockett v. Ohio*, No. 76-6997, at 14, and cases there cited.

> *could not put on the stand against his will*) could have contradicted the government witness."

Desmond v. United States, 345 F.2d 225, 227 (CA1 1965) (emphasis added). *See also United States v. Flannery*, 451 F.2d 880 (CA1 1971); *United States v. Handman*, 447 F.2d 853 (CA7 1971).[23]

This is not a case where a criminal defendant objects to "ordinary trial error of a prosecutor," *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974), during closing argument. It is rather one where the State has "denied a defendant the benefit of a specific provision of the Bill of Rights" and "so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right." *Id.* at 643. The Ohio Supreme Court exalted form over substance by finding no "comment . . . upon the failure

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[23]Courts have given short shrift to speculations that, in this sort of factual situation, such references by the prosecutor might have alluded to unidentified third-party witnesses instead of to the defendant.

> "The Government's present argument that since the transaction took place in an apartment house perhaps there were other persons around, though its own witnesses had suggested no one, and on the face of things it would be to a degree unlikely, is sound neither in fact nor in law. *Unless it is apparent on the record* that there was someone other than himself whom the defendant could have called, the comment of necessity pointed to the only person who could have offered the contradiction, the defendant himself."

Desmond v. United States, 345 F.2d 225, 227 (CA1 1965) (emphasis added). *See also United States v. Flannery*, 451 F.2d 880, 881-882 (CA1 1971); *United States v. Handman*, 447 F.2d 853, 855-856 (CA7 1971).

of the defendant to testify" here: the careful and comprehensive nature of the State's focused argument about the effect of petitioner's failure to take the stand made a direct description of this failure a mere redundancy. "This Court has always broadly construed [the Fifth Amendment's] . . . protection" because "of the place this privilege occupies in the Constitution and in our adversary system of justice, as well as the traditional respect for the individual that undergirds the privilege." *Maness v. Meyers*, 419 U.S. 449, 461 (1975).[24] "To apply the privilege narrowly or begrudgingly – to treat it as an historical relic, at most merely to be tolerated – is to ignore its development and purpose." *Quinn v. United States*, 349 U.S. 155, 162 (1955). *See also Ullmann v. United States*, 350 U.S. 422, 426 (1956). Consistently with this purpose, the Court should rule that the Fifth Amendment prohibits not only "direct comment" on the failure of a defendant to testify but also any argument that naturally and necessarily focuses upon a defendant's silence. For the privilege against self-incrimination " 'registers an important advance in the development of our liberty – "one of the great landmarks in man's struggle to make himself civilized." . . . It reflects many of our fundamental values and most noble aspirations.' " *Murphy v. Waterfront Comm'n of New York*, 378 U.S. 52, 55 (1964). It is not, or should not be, a mere straw man for prosecutors to topple with contrived forms of words.

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[24] *See* LEVY, ORIGINS OF THE FIFTH AMENDMENT 405-532 (1968).

II.

PETITIONER'S SENTENCE OF DEATH IS CONSTITUTIONALLY INVALID.

INTRODUCTION

This case involves the imposition of a death sentence upon a young woman who is innocent of committing, attempting, or intending any violent assault, let alone an assault in which "a life has been taken deliberately by the offender," *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)(plurality opinion). Petitioner's sentencing judge, notwithstanding his expressed misgivings, was compelled by Ohio law to inflict the punishment of death *without taking account of* the facts relevant to the extent of her individual culpability for Sidney Cohen's killing, or her own character. The case therefore raises issues concerning both the range of circumstances under which the death penalty is constitutionally tolerable, and the constitutional requirements that must be satisfied by procedures through which the extreme penalty is meted out.

Petitioner's submissions start, as they must, with this Court's recent decisions governing capital punishment. In reviewing the death penalty provisions of Georgia, Florida, North Carolina and Louisiana, the Court has determined that informed, focused capital sentencing deliberations, subject to reevaluation by a State's highest court, serve sufficiently to minimize the risk of arbitrary or inappropriate use of the penalty; but that mandatory capital sentencing systems impermissibly preclude particularized consideration of the appropriateness of a sentence of death, and invite arbitrariness.

Gregg v. Georgia, supra, Proffitt v. Florida, 428 U.S. 242 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976). In upholding the death penalty provisions of the State of Texas, the Court has determined that a reviewable inquiry concerning the future dangerousness of a capitally convicted defendant properly encompasses sufficient analysis of "particularized mitigating factors," such as youth and lack of a serious prior criminal record, *Jurek v. Texas*, 428 U.S. 262, 272-73 (1976) (plurality opinion), to prevent arbitrary or inappropriately severe death sentences.

These decisions require that "each distinct [capital sentencing] system must be examined on an individual basis." *Gregg v. Georgia, supra*, 428 U.S. at 195. The Ohio statute under which petitioner stands condemned is distinctive in that it provides a sentencing hearing – thereby avoiding the appearance of mandatoriness – while narrowing the scope of sentencing deliberations so drastically as to preclude an "individualized sentencing determination," *Jurek v. Texas, supra*, 428 U.S. at 271, which affords a "meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender," *Stanislaus Roberts v. Louisiana, supra*, 428 U.S. at 333-334. Moreover, the Ohio death sentencing procedure lacks the ameliorating influence of jury participation and therefore stands isolated from the conscience of the community; it penalizes exercise of the rights to plead not guilty and to have a jury trial even as to the question of guilt or innocence; and it shifts to the capitally convicted defendant the risk of non-persuasion of facts upon

which life and death depend. Separately and in combination,[25] these procedures violate the Sixth, Eighth and Fourteenth Amendments and fail to provide a process which is constitutionally adequate to support the fateful decision to take a human life.[26] "Due process of law, preserved for all by our Constitution, commands that no such practice . . . shall send any accused to his death."[27]

A. The Ohio Death Penalty Statutes Place Unconstitutional Limitations Upon the Consideration of Mitigating Circumstances.

Woodson v. North Carolina, supra and *Stanislaus Roberts v. Louisiana, supra*, hold that contemporary standards of decency require "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Woodson v. North Carolina, supra*, 428 U.S. at 303 (plurality opinion). The Court recognized that:

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from

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[25] *Cf. Chambers v. Mississippi*, 410 U.S. 284, 298-303 (1973).

[26] *See Gardner v. Florida*, 430 U.S. 349, 357-358 (1977) (plurality opinion); *id.* 15 362-364 (opinion of Mr. Justice White).

[27] *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

> the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

Id. at 304. Again, in *Harry Roberts v. Louisiana*, ____ U.S. ____, 52 L.Ed.2d 637 (1977), the Court stressed that "it is essential that the capital sentencing decision allow for consideration of *whatever* mitigating circumstances may be relevant either to the particular offender or the particular offense." *Id.* at 642 (emphasis added). This conclusion was dictated by "our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'" *Stanislaus Roberts v. Louisiana, supra*, 428 U.S. at 333 (plurality opinion). Historically, *Woodson* noted that the several legislative enactments allowing rigid application of the death penalty in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), represented not renewed societal acceptance of undiscriminating infliction of capital punishment, but rather attempts by the States to conform to what were incorrectly thought to be the requirements of *Furman*. *Woodson v. North Carolina, supra*, 428 U.S. at 298-99 (plurality opinion).

Examination of the Ohio death penalty statutes and the history of their enactment establishes that they, like the statutes invalidated in *Woodson* and the two *Roberts* decisions, are more rigid than contemporary standards of decency can condone. They reflect not societal acceptance of such rigidity, but rather an effort by the Ohio Legislature to meet criteria that were wrongly supposed to be mandated by *Furman*.

In the wake of *Furman*, 35 States enacted new death sentencing provisions.[28] Many of these states, responding to the judgment of respected legal scholars that only the removal of all sentencing discretion would satisfy the requirements of *Furman*, made the death penalty mandatory upon conviction for certain offenses. Other jurisdictions, however, followed the example of the Model Penal Code[29] and directed the consideration of aggravating and mitigating circumstances in the process of determining sentence in a capital case. These jurisdictions, finding the mandatory scheme too inflexible and anticipating that this Court would approve capital sentencing discretion if that discretion were guided by standards, chose to focus sentencing deliberations upon a broad range of mitigating factors.[30]

At the time of the *Furman* decision, a statute containing mitigating circumstances of the kind set forth in the Model Penal Code had passed the Ohio House of Representatives and was pending before the Senate Judiciary Committee.[31] In light of *Furman*, the Senate Committee felt it necessary, in the words of two primary sponsors of the bill, to

> "[r]efine the House position by retaining the death penalty, but remov[ing] from the judge and

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[28] *See Gregg v. Georgia, supra*, 428 U.S. at 179-80 n.23.

[29] *See* AMERICAN LAW INSTITUTE, MODEL PENAL CODE §201.6 (P.O.D. 1962).

[30] *See* pp. 57-58 and notes 41-42, *infra*.

[31] Lehman & Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 CLEV. ST. L. REV. 8, 18 (1974).

> the jury as much discretion as possible in the punishment determination procedure."[32]

Sentencing determinations in capital cases were therefore taken from the jury, and all mitigating factors having to do with the character and background of the offender were eliminated, save one:

> "The offense was primarily the product of the offender's psychosis or mental deficiency . . ."

Ohio Rev. Code Ann. Sec. 2929.04(B)(3).[33]

In view of the extreme improbability that a psychotic offender would be found criminally responsible, the utility of this circumstance as a means of allowing consideration of the life and character of the accused

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[32] *Id.* at 20.

[33] The statute provides that the trial judge or, if trial is without a jury, a panel of judges, Ohio Rev. Code Ann. Sec. 2929.03 (C), must impose a death penalty unless the defendant convicted of aggravated murder with specifications proves one of the following factors by a preponderance of the evidence:

> "(1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Ohio Rev. Code Ann. Sec. 2929.04(B). The purpose of the Ohio statute to achieve maximal mechanistic rigidity is underscored by the fact that these three factors are not considerations to be weighed in the balance of a flexible sentencing process. If found factually, they categorically *preclude* the imposition of a death sentence.

turns, in practice, upon the scope of the term "mental deficiency." This term is, as a matter of general and psychiatric usage, synonomous with mental retardation, and the Supreme Court of Ohio has held that its meaning is not significantly broader in the context of Sec. 2929.04. *State v. Bayless*, 48 Ohio St.2d 73, 357 N.E.2d 1035(1976).[34] Thus – under a sentencing scheme designed "to remove . . . as much discretion as possible in the punishment determination procedure"[35] – every person who is neither psychotic nor mentally retarded and who is convicted of a capital crime becomes part of "a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death"[36] without independent consideration of mitigating aspects of his life and character.

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[34]That Court noted:

> "[m]ental deficiency is consistently defined to mean a low or defective state of intelligence,"

id. at 96, 357 N.E.2d at 1050, and deemed itself:

> ". . . unable to find that the decision of the General Assembly to allow mitigation of sentence for those who are mentally deficient, but not of other mental disorders not constituting psychosis or amounting to insanity, falls outside the proper scope of its authority to assign responsibility and punishment for criminal offenses."

Id. at 87, 347 N.E.2d at 1046. In *State v. Royster*, 48 Ohio St.2d 381, 358 N.E.2d at 616 (1976), the court upheld, against a claim that the evidence required a finding of mental deficiency, a death sentence imposed upon a defendant who "had an I.Q. of 75 in 1962; 61 in 1966; and 54 in 1968." *Id.* at 389, 358 N.E.2d at 622.

[35]*See* note 32, *supra.*

[36]*Woodson v. North Carolina, supra*, 428 U.S. at 304 (plurality opinion).

Furthermore, the Ohio legislation precludes consideration of most mitigating circumstances relating to the crime itself, permitting mercy only in the rare case in which duress, extreme provocation, or victim inducement is present but does not constitute a defense to the charge of aggravated murder.[37]

In sharp contrast to the rigid Ohio scheme, this Court's recognition that, under contemporary standards for the imposition of punishment, " 'individual culpability is not always measured by the category of crime committed,"[38] has been thoroughly confirmed by the record of capital legislation enacted since July, 1976. For legislatures free of misconceptions engendered by the *Furman* opinions have commonly allowed consideration of *any* circumstance deemed mitigating by the sentencer,[39] and have in no case defined mitigating

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[37]*See* note 33, *supra.*

[38]*Stanislaus Roberts v. Louisiana, supra*, 428 U.S. at 333 (plurality opinion).

[39]Cal. Penal Code §190.3 (as amended by Stats. 1977, c. 316, eff. Aug. 11, 1977). Del. Code §4209(c) (1977 amendment); Idaho Code §19-2515(c) (as amended by 1977 Idaho Sess. Laws c.154, §4); Smith-Hurd Ill. Ann. Stat., c.38 §9-1(c) (1977 amendment); Burns Ind. Stat. Ann. §35-50-2-9(c)(7)(1977 amendment); Baldwin's Ky. Rev. Stat. §532.025(2) (as amended by H. B. 14, c.15, Ky. Laws 1976); La. Code Crim. Pro. Ann., Art. 905.5(1977 cum. ann. pocket part); Miss. Code of 1972 §97-3-21(2)(1977 amendment); Rev. Stat. Mo., c. 559, as amended by House Bill No. 90, 79th Gen. Ass. (1st Reg. Sess.), §5.1(3)(1977); Nev. Rev. Stat, c. 200, as amended by Laws Nev., c. 585, §4.7 (59th Sess., approved May 17, 1977); N.H. Rev. Stat. Ann. §630.5 (II) (amended 1977, 440:2, eff. Sept. 3, 1977); N.C. Gen. Stat., Art. 100, §15A-2000(1)(9), as added by Gen. Ass. Ratified Bill, c. 406 (1977); Okla. Stat. Ann. §701.10

(continued)

factors as restrictively as did the Ohio legislature.[40] Taken together with the pre-*Gregg* statutes still in effect which allow consideration of any mitigating circumstance[41] or a broad range of specified factors,[42] these enactments demonstrate impressively that the legislative judgment of the Nation has rejected anything approach-

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(footnote continued from preceding page)
(1976 cum. pocket part); S.C. Code of 1962 §16-52(C) (1977 amendment); Tenn. Code Ann. §39-2404(j), as amended by Public Acts 1977, c. 51 (enacted April 11, 1977); Va. Code Ann. §19.2-264.3(B) (1977 amendments, c. 492); Wash. Rev. Code Ann. §9A.32.045(2), as amended by Laws of 1977, c. 206 (enacted June 10, 1977).

[40]Of the seventeen States which have recently passed statutes allowing any mitigating factor to be considered, cited in note 39, *supra*, all but four (Delaware, Idaho, Mississippi and Oklahoma) additionally provide broad rosters of mitigating circumstances similar to the Model Penal Code. An eighteenth state, Wyoming, does not appear to allow open-ended consideration of mitigating circumstances but does provide a substantial roster of the sort contained in the Model Penal Code. Wyo. Stat. §6-54.2(c),(d) and (j), as enacted by Enrolled Act No. 42, Senate, 44th Legislature, c. 122 (1977 Sess.).

[41]Ga. Code Ann. §27-2534.1(b)(1974 cum. pocket part); Mont. Rev. Code Ann. §94-5-105(1)(1974 interim supp. part 3); Vernon's Texas Code Crim. Pro. Ann., Art. 37.071(b)(2) (*see Jurek v. Texas, supra*, 428 U.S. at 272-73); Utah Code Ann. §76-5-202(1)(g)(1975 cum. supp.).

[42]Code Ala. Recomplied, tit. 15, §342(9)(1975 interim supp.); Ark. Code §41-1304(1975 special supp.); Colo. Rev. Stat. 1973, §16-11-103(5)(1976 cum. supp.); Conn. Gen. Stat. Ann §53a-46a(f)(1976 cum. pocket part); Fla. Stat. Ann. §921.141(6)(1976 cum. pocket part); Neb. Rev. Stat. §29-2523(2)(1975); 49 U.S.C.A. §1473(c)(6)(1976).

ing the severe narrowness of Ohio's death-sentencing scheme.

Petitioner's case amply demonstrates the rigidity and the inhumanly narrow circumscription of mitigating considerations in the Ohio sentencing scheme. For she was condemned, not in spite of, *but without consideration of:*

- her youth;
- the unrefuted evidence of her generally good character;
- the fact that her entire record of criminal convictions consists of two misdemeanors;
- her excellent prospects for rehabilitation;
- the fact that she did not kill anyone or willingly participate in any design to kill anyone;
- the fact that her participation in the crime was relatively minor; and
- the fact that the killing itself, committed by another individual (who did not receive the death penalty), was not intentional.

This result was possible because, unlike the Texas statute which this Court sustained only through a liberal and nonliteral construction of its terms in *Jurek,*[43] the Ohio statute fails to provide a sentencing question which is both open-ended and invariably applicable (let alone an unlimited roster or a broad-ranging list of mitigating factors as in Georgia or in Florida).[44] Any defendant, for any number of reasons, may or may not be a future threat to society, *see Jurek v. State*, 522 S.W.2d S.W.2d 934, 939-40 (Tex.Crim.

[43]*See Jurek v. Texas, supra*, 428 U.S. at 272-273.

[44]*See Gregg v. Georgia, supra; Proffitt v. Florida, supra.*

App. 1975); *Jurek v. Texas, supra*, 428 U.S. at 272-74 (plurality opinion); but even the most mercy-deserving of capital defendants may happen not to have acted under duress or victim inducement or to have been psychotic or retarded.

We shall submit in the following subsection, pages 57-63 *infra*, that the infliction of the death penalty on the facts of this particular case flouts the holding of *Coker v. Georgia*, ____ U.S. ____, 53 L.Ed.2d 982 (1977), and is unconstitutionally excessive. For purposes of the Eighth Amendment's proscription of disproportionately severe punishments, petitioner is no more a murderer than Ehrlich Coker was, and far less a criminal. Our present point is narrower, however. Even if the State of Ohio might constitutionally exact the ultimate penalty upon consideration of all of the circumstances of petitioner's case, surely it may not impose that penalty *in the absence* of such consideration. Even if Ohio might decree the punishment of death for a crime that is committed vicariously without killing or intending to kill, surely it may not impose that punishment through procedures which categorically forbid its sentencers to appraise the relevance – in deciding "whether this defendant was fit to live"[45] – of the facts that the defendant was only vicariously liable, and neither killed nor intended to kill.

A death-sentencing system which thus blindly requires the condemnation of a young woman like Sandra Lockett, and furthermore provides no appellate

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[45] *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968).

protection against her execution,[46] cries for invalidation by this Court in light of the "fundamental respect for humanity underlying the Eighth Amendment . . . [that] requires consideration of the character and record of the individual offender and the circumstances of the

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[46]Nothing in Ohio's post-*Furman* legislation alters the fact that "[u]nder Ohio law, a death verdict may not be reduced as excessive by . . . the appellate court," *McGautha v. California*, 402 U.S. 183, 195 (1971).

Although the Ohio Supreme Court has said that Ohio's three statutory mitigating circumstance provisions must "be liberally construed in favor of the accused," *State v. Bell*, 48 Ohio St.2d 270, 281, 358 N.E.2d 556, 564 (1976), *cert. granted* ____ U.S. ____, 53 L.Ed.2d 1091 (1977), it has also held that it "will not retry issues of fact" going to sentence, but will only determine "whether there is sufficient substantial evidence to support the verdict rendered." *State v. Edwards*, 49 Ohio St.2d 31, 47, 358 N.E.2d 1051, 1062 (1976). Thus the Court has upheld a finding of no duress or mental deficiency, and the resultant death sentence, in the case of a sixteen year old accomplice of an adult triggerman where "[t]here was evidence in the psychiatric reports that . . . [he] was perhaps easily led by . . . [the triggerman]" and evidence of "an unsatisfactory home, absence of family or other supervision, drug involvement, and an inability to cope with school demands," *State v. Bell, supra*, 48 Ohio St.2d at 282, 358 N.E.2d at 564-65. *See also State v. Royster, supra* note 34.

The Ohio Supreme Court has reviewed 25 post-*Furman* death sentences. It has reduced none. The citations of these cases are appended as Appendix A, *infra.*

An intermediate Ohio appellate court has vacated the death sentences of two co-defendants after finding that the undisputed evidence established victim facilitation and inducement under Ohio Rev. Code Ann. Sec. 2929.04(B)(1). *State v. Hines*, Ct. of Appeals, Fifth App. Dist., Case Nos. CA-634, 639 (conspicuously armed victim seeking to buy large quantity of marijuana).

particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death," *Woodson v. North Carolina, supra*, 280 U.S. at 304 (1976) (plurality opinion). This Court held in *Jurek* that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should *not* be imposed." 428 U.S. at 271 (plurality opinion) (emphasis added). Such consideration demands attention to "whatever mitigating circumstances" may be relevant to the individual offender or to the specific offense before extinguishing human life. *Harry Roberts v. Louisiana, supra*, 52 L.Ed.2d at 642. Ohio has not begun to meet that constitutional requirement here.

B. Death is a Disproportionately Severe and Unconstitutional Sentence for One Who Has Not Taken Life, Attempted to Take Life, or Intended to Take Life.

We have just seen that the invalidity of petitioner's death sentence may be established on the procedural ground of the inadequacy of the sentencing inquiry permitted by Ohio law. Substantively, her sentence raises the further question whether the imposition of the death penalty in a case of this kind is "so disproportionate in comparison to the nature of the defendant's . . . involvement in the capital offense as independently to violate the Eighth and Fourteenth Amendments." *Woodson v. North Carolina, supra*, 428 U.S. at 305 n.40 (plurality opinion). Petitioner contends that the use of the death penalty against a defendant who is merely a minor participant in a

felony-murder situation, where the underlying felony involved no design to kill and where the defendant took no part in the acts which actually caused the felony-murder victim's death, is demonstrably disproportionate, unjustifiable and inconsistent with contemporary standards of decency. At least where, as here, no other basis appears in the record to support the judgment that such an offender is unfit to live, the penalty of death is " 'excessive' [as] . . . applied to [the] . . . specific defendant for [the] . . . specific crime," *Gregg v. Georgia, supra*, 428 U.S. at 173 (plurality opinion), and is unconstitutional.

It is a settled Eighth Amendment principle that "punishment for crime should be graduated and proportioned to offense" *Weems v. United States*, 217 U.S. 349, 366-67 (1910). This Court has held that a punishment is unconstitutional where it "(1) makes no reasonable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." *Coker v. Georgia*, ____ U.S. ____, 53 L.Ed.2d 982, 989 (1977). While the Court has concluded that "the death penalty for *deliberate* murder [is] neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime, *ibid.* (emphasis added), it held in *Coker* that the death penalty was disproportionate and therefore unconstitutionally excessive for the non-homicidal crime of rape.

Petitioner's death sentence does not and cannot rest upon a finding that she deliberately committed a murder. It was not imposed "for the crime of murder,

and when a life has been taken deliberately by the offender," *Gregg v. Georgia, supra*, 428 U.S. at 187 (plurality opinion) (emphasis added). At most it rests upon a finding that petitioner was a participant in the non-homicidal crime of armed robbery. Her participation in that crime – less substantial than Coker's in his – has been made the basis for a death sentence exclusively through the operation of vicarious-liability/felony-murder doctrines that permitted her to be convicted of "aggravated murder" despite the absence of any intent to kill or action of hers directed toward killing. Viewing the facts most unfavorably to Sandra Lockett, her " 'individual culpability' "[47] is no greater than that of any other aider and abettor in an armed robbery. Nothing else in this record sustains the death penalty. To the contrary, the record is replete with mitigating circumstances – enumerated in the preceding subsection, at page 58, *supra* – which Ohio law did not permit her sentencer to consider. On such a record, the "objective indicia" to which this Court must look in measuring a punishment against "contemporary values [as] . . . relevant to the application of the Eighth Amendment," *Gregg v. Georgia, supra*, 428 U.S. at 173 (plurality opinion), plainly establish the unconstitutionality of Sandra Lockett's death sentence.

We begin (as did the Court in *Gregg* and *Coker*) with an examination of the recent actions of state legislatures. Compelled by *Furman* and then *Woodson* to address the problem of defining the circumstances under which the punishment of death is and is not

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[47] *Roberts v. Louisiana, supra*, 428 U.S. at 333 (plurality opinion.

appropriate, *all* American legislatures except Ohio's have recognized the mitigating force of a defendant being merely a minor participant in a homicide committed by somebody else. Of the jurisdictions which now have death penalty statutes, six would preclude petitioner's execution outright;[48] sixteen others specify that a minor degree of participation must be considered as a factor in the life-or-death sentencing decision;[49] and the

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[48] Cal. Penal Code §190.5(b) (as amended by Stats. 1977, c. 316, Sen. Bill. 155, eff. Aug. 11, 1977; Colo. Rev. Stat. 1973 §16-11-103(5)(d)(1976 cum. supp.); Conn. Gen. Stat. Ann. §53a-46a(f)(4)(1976 cum. pocket part); Smith-Hurd Ill. Ann. Stat. c.38 §9-1(b)(6)(a)(1977 amendment); Pa. Stat. Ann. tit. 18 §1102, 2502 (1977 cum. ann. pocket part)(death penalty precluded for both principals and accomplices in felony murder); 49 U.S.C.A. §1473(6)(D) (1976).

[49] Ala. Code Recompiled, tit. 15, §342(9)(d)(1975 interim supp.); Ariz. Rev. Stat. § 13-454(F)(3)(1973 supp. pamphlet); Ark. Code § 41-1304(5)(1975 supp.); Fla. Stat. Ann. § 921.141 (6)(d)(1976 cum. pocket part); Burns Ind. Stat. Ann. §35-50-2-9(c)(4) 1977 amendment); Baldwin's Ky. Rev. Stat. §532.025(2)(b)(5) (as amended by H.B. 14, c. 15, Ky. Laws 1976); La. Code Crim. Pro. Ann., Art. 905.5(g)(1977 cum. ann. pocket part); Rev. Stat Mo., c. 559, as amended by House Bill No. 90, 79th Gen. Ass. (1st Reg. Sess.), §5.1(3)(4)(1977); Neb. Rev. Stat. §29-2523(2)(e)(1975); Nev. Rev. Stat., c. 200, as amended by Laws Nev. 585, §4.4 (59th Sess., approved May 17, 1977); N.C. Gen. Stat., Art. 100, §15A-2000(f)(9), as added by Gen. Ass. Ratified Bill, c. 406 (1977); S.C. Code of 1962 §16-52(C)(v)(4) (1977, amendment); Tenn. Code Ann. §39-2404(j)(5), as amended by Public Acts, 1977 c. 51 (enacted April 11, 1977); Utah Code Ann. §76-3-207(1)(f)(1975 cum. aupp.); Wash. Rev. Code Ann. §9A.32.045(2), as amended by Laws of 1977, c. 206 (enacted June 10, 1977); Wyo. Stat. §6-54.2(c),(d) and (j)(iv), as enacted by Enrolled Act No. 42, Senate, 44th Legislature, c. 112 (1977 Sess.).

remaining nine allow consideration of any mitigating factor.[50] Not a single state has followed Ohio in excluding minor participation as a mitigating factor.[51] Clearly, the evolving standards of decency of this Nation require at the least that the offender's minor participation in a homicide be considered by the sentencing authority in determining whether he lives or dies. And, if these several statutes are not permitted to operate arbitrarily in a fashion that would violate the commands of *Furman v. Georgia, supra; see Gardner v. Florida*, 430 U.S. 349, 361 (1977) (plurality opinion), it must also be assumed that the imposition of a death sentence with *no* affirmative factor supporting it *except* the defendant's minor participation in a crime leading to a killing by someone else would be wholly unacceptable.

But that is not the end of the story. For the history of actual use of the death penalty in the recent past confirms without question that the combined effect of the exercise of jury discretion and the discretion of executive and prosecuting officials has been not merely consideration of minor participation as mitigating, but

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[50]See statutes of Delaware, Georgia, Idaho, Mississippi, Montana, New Hampshire, Oklahoma, Texas and Virginia cited in notes 39 and 41 *supra*.

[51]We except from this analysis the mandatory death sentencing statutes still in force in New York and Rhode Island, which are directed solely at murders committed by prison inmates. N.Y. Penal Law §60.06. 125.27(3), (1976 cum. supp.) (limited to prisoners serving life sentences, and escapees)(*see People v. James*, ____ N.Y.2d ____, No. 467, slip. op. at 15, decided November 15, 1977); R.I. Gen. Laws 1956, §11-23-2(1976 supp.).

de facto abolition of the death penalty for non-triggermen in felony-murder situations. A search of all reported appellate opinions in post-1954 cases of executions for homicide reveals only six cases out of 363 in which clearly identifiable felony-murder non-triggermen were executed. The last such execution occurred in 1955, twenty-two years ago.[52] By comparison, there have been 72 executions for rape in this country since 1955.[53] Thus, it is apparent that executions for homicides not clearly committed by the person executed have been a good deal less prevalent in this country than the practice declared unconstitutional in *Coker v. Georgia, supra.* Looking as this Court did in *Coker* to "guidance in history and from the objective evidence of the country's present judgment," *id.* at 998, one finds that the death penalty for non-triggermen is today virtually extinct.[54]

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[52]This survey was conducted by searching for reported opinions in all post-1954 cases of executions for homicide listed in the inventory in BOWERS, EXECUTIONS IN AMERICA 200-401 (1974). The complete survey, including the citation of all 363 cases found, isset forth in Appendix B to this brief.

In addition to six clearly identifiable non-triggermen, the survey found two non-felony murders where the executed person had others commit the homicide for him, and eight other cases where the facts were not reported in sufficient detail to determine whether the executed person was a non-triggerman.

[53]UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS BULLETIN, NO. SD-NPS-CP-3, CAPITAL PUNISHMENT 1974 (November 1975) 16-17.

[54]The Florida Supreme Court has several times rejected application of the death penalty to non-triggermen. *See McCaskill v. State*, 344 So.2d 1276 (Fla. 1977); *Williams v. State*, 344 So.2d 1276 (Fla. 1977); *Slater v. State*, 316 So.2d 539 (Fla. 1975); *Taylor v. State*, 294 So.2d 648 (Fla. 1974); *and compare Cooper v. State*, 336 So.2d 1133, 1141-1142 (Fla. 1976). The

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The behavior of juries and public officials in non-triggerman cases is indicative that there does not exist with regard to these cases such "moral outrage," *Gregg v. Georgia, supra*, 428 U.S. at 183 (plurality opinion), that "the only adequate response may be the penalty of death," *id.* at 184. And, whatever assumptions might be made regarding the deterrent effect of the death penalty for "carefully contemplated murders," *id.* at 186, or in categories of cases for which "other sanctions may not be adequate," *ibid.*, it is simply common sense that the use of the death penalty against a non-triggerman who does not commit, attempt, or intend a killing will not reduce the incidence of murder. Thus, the execution of petitioner and of similarly situated murderers-by-legal-fiction would "be so totally without penological justification that it results in the gratuitous infliction of suffering." *Id.* at 183.

Nothing excepting Sandra Lockett's relatively minor participation in the robbery which led to Sidney Cohen's death at the hands of Al Parker (himself since sentenced not to death but rather to imprisonment for that killing) has been put forward by the State to justify her death sentence. The Court therefore need not consider whether – contrary to the plain implications of *Coker v. Georgia, supra*, – a death sentence might ever be imposed constitutionally for non-homicidal criminal conduct of this sort, on the

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(footnote continued from preceding page)
Georgia Supreme Court has affirmed the death sentence of a non-triggerman, *Hill v. State*, 237 Ga. 794, 299 S.E.2d 737 (1976), but Hill's death sentence has since been commuted. *See* Georgia State Board of Pardons and Paroles, Commutation Proceedings in *State v. Hill*, opinion of September 28, 1977.

basis of peculiar aggravating features of the offender or his role in the offense. There are, quite simply, no such features in this case. In their absence, a judgment of the State of Ohio to kill Sandra Lockett, who herself has not killed, attempted to kill, or intended to kill any human creature, is so "grossly out of proportion to the severity of the crime" that it cannot possibly "accord with 'the dignity of man', which is the basic concept underlying the Eighth Amendment.' " *Gregg v. Georgia, supra*, 428 U.S. at 173.

C. The Ohio Death Penalty Statutes Violate the Sixth, Eighth and Fourteenth Amendments in that They Deny the Capitally Accused the Right to a Judgment of his Peers as to the Existence of Mitigating Circumstances, and the Appropriateness of the Penalty of Death.

In view of the "awesome finality of a capital case,"[55] American jurisdictions had, prior to *Furman v. Georgia, supra*, determined with near unanimity that infliction of the death penalty should be put in the hands of the jury rather than the judge. Indeed, "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." *McGautha v. California*, 402 U.S. 183, 200 n.11 (1971).

> "The inadequacy of distinguishing between murderers solely on the basis of legislative criteria

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[55] *Kinsella v. Singleton*, 361 U.S. 234, 249, 255 (1960) (dissenting and concurring opinion of Mr. Justice Harlan).

narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases. Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846, were the first states to abandon mandatory death sentences in favor of discretionary death penalty statutes. This flexibility remedied the harshness of mandatory statutes by permitting the jury to respond to mitigating factors by withholding the death penalty. By the turn of the century, 23 states and the Federal Government had made death sentences discretionary for first-degree murder and other capital offenses. During the next two decades 14 additional states replaced their mandatory death penalty statutes. Thus, by the end of World War I, all but eight states, Hawaii, and the District of Columbia either had adopted discretionary death penalty schemes or abolished the death penalty altogether. By 1973, all of these remaining jurisdictions had replaced their automatic death penalty statutes with discretionary jury [56] sentencing."[57]

In Ohio, the shift to jury discretion in capital sentencing came in 1898,[58] and the system prevailed without interruption until the death penalty statutes of that State were invalidated in 1972. There is no doubt that the subsequent determination to strip the jury of

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[56]In 1965, the State of Colorado placed discretionary authority to determine sentence in capital murder cases solely in the hands of the trial judge. It was the only jurisdiction to do so after the national shift to jury discretion or abolition and before *Furman.* BOWERS, EXECUTIONS IN AMERICA 8 (1974).

[57]*Woodson v. North Carolina, supra*, 428 U.S. at 291-92 (plurality opinion)(footnote omitted).

[58]BOWERS, EXECUTIONS IN AMERICA 8 (1974).

its control over the use of the death penalty reflected the desire of the Ohio Legislature to "retain the death penalty in a form consistent with the [Federal] constitution"[59] rather than a willing abandonment of the principle that the momentous decision to take or spare the life of a criminal defendant should be made only by a jury of his peers. For the new Ohio Criminal Code, as drafted before the decision of this Court in *Furman v. Georgia* plainly provided for jury sentencing in capital cases.[60] But faced with the *Furman* ruling that unbridled jury discretion to impose a death sentence was constitutionally prohibited, and the opinion expressed in *McGautha* that the formulation of standards to guide juries in the capital sentencing process was impossible, the Ohio legislature undoubtedly thought it necessary to make capital sentencing a matter solely for judicial determination.[61] Accordingly, the current Ohio death penalty statute placed the life or death of Sandra Lockett entirely in the hands of the trial judge.

This Court has now held that "*McGautha*'s assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience." *Gregg v. Georgia, supra*, 428 U.S. at 196 n.47 (plurality opinion). The Court has reaffirmed the desirability of

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[59] *Woodson v. North Carolina, supra*, 428 U.S. at 298 (plurality opinion).

[60] Lehman & Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 CLEV. ST. L. REV. 8, 16-17 (1974).

[61] *Id.* at 20.

jury input in the capital sentencing process, *id.* at 190; *Proffitt v. Florida, supra*, 428 U.S. at 252;[62] and it has struct down the death penalty laws of three States for their failure to provide a "meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." *Stanislaus Roberts v. Louisiana, supra*, 428 U.S. at 333-34. While it has concededly "never suggested that jury sentencing is constitutionally required," *Proffitt v. Florida, supra*, 428 U.S. at 252, it also has neither considered nor approved a post-*Furman* death penalty statute which excluded the jury totally from the process of determining sentence.[63] For, in upholding the Florida

[62]*See also Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968); *McGautha v. California, supra*, 402 U.S. at 200 n.11, 211.

[63]The Court's conjecture that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases," *id.* at 252, must, of course, be taken in the context in which it was issued – as a statement of the probable result of a system in which an advisory jury sentence may be mitigated at the discretion of the trial judge and may be increased only where a life sentence would be clearly unreasonable, *id.* at 249. Even so, it is not borne out by the record of extensive documentation of widely varying sentencing attitudes and practices among judges. *See, e.g.*, TWENTIETH CENTURY FUND, TASK FORCE ON CRIMINAL SENTENCING, REPORT: FAIR AND CERTAIN PUNISHMENT (1976); VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); FRANKEL, CRIMINAL SENTENCES – LAW WITHOUT ORDER (1972); HOGARTH, SENTENCING AS A HUMAN PROCESS (1971); Zumwatt, *The Anarchy of Sentencing in the Federal Courts*, 57 J. AM. JUD. SOC. 96 (1973).

post-*Furman* death penalty statute, the Court approved only the most limited encroachment upon the tradition that juries rather than judges must speak to the question of life or death. Under Florida law:

> "The jury's [sentencing] verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that '[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' "

Proffitt v. Florida, supra, 428 U.S. at 248-49.[64]

Although it may be permissible (and desirable) to permit trial judges to review jury sentences determined under the influence of passion or prejudice, or against the weight of the relevant aggravating and mitigating evidence, the imposition of the death penalty under a procedure which affords no opportunity for meaningful jury input – a practice introduced to contemporary jurisprudence as a result of confusion engendered by

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[64]In eleven of the twelve cases in which death sentences have been set aside by the Florida Supreme Court to date, the jury had recommended a life sentence. *McCaskill v. State*, 344 So.2d 1276 (Fla. 1977); *Williams v. State*, 344 So.2d 1276 (Fla. 1977); *Burch v. State*, 343 So.2d 831 (Fla. 1977); *Chambers v. State*, 339 So.2d 204 (Fla. 1976); *Provence v. State*, 337 So.2d 783 (Fla. 1976); *Jones v. State*, 332 So.2d 615 (Fla. 1976); *Thompson v. State*, 328 So.2d 1 (Fla. 1976); *Tedder v. State*, 322 So.2d 908 (Fla. 1975); *Swan v. State*, 322 So.2d 485 (Fla. 1975); *Slater v. State*, 316 So.2d 539 (Fla. 1975); *Taylor v. State*, 294 So.2d 648 (Fla. 1974). The only exception is *Halliwell v. State*, 323 So.2d 557 (Fla. 1975).

Furman and *McGautha* – erodes three independent constitutional principles. We submit that such a procedure, by which Sandra Lockett was consigned to death without a jury's consideration of the fitness of the extreme punishment in her case, cannot be squared with the Sixth, Eighth and Fourteenth Amendments.

1. The Principle that Death Sentences May be Imposed Only Through the Intervention of a Jury is Fundamental to our Jurisprudence and Provides an Essential Assurance Against Disproportionality and Excessiveness in Capital Sentencing.

"The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society." *Marion v. Beto*, 434 F.2d 29, 32 (CA5 1970). We have traced a history which strongly suggests that jury participation in such a decision represents a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 104 (1934).[65] Because "the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action," *Gardner v. Florida*, ____ U.S. ____, 51 L.Ed.2d 393, 402 (1977) (plurality opinion), it is vitally important that the death-sentencing decision

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[65]*See Bloom v. Illinois*, 391 U.S. 194, 202-07 (1968), in which the Court relied upon a comparable historical pattern to impose constitutional limitations upon "the power of judges to try contempts of their own authority." *Id.* at 207.

neither be nor appear to be made in an arbitrary or capricious manner. *Gregg v. Georgia, supra; Gardner v. Florida, supra; Furman v. Georgia, supra.* Death sentencing by a restricted corps of legal professionals, and particularly by one of their number sitting as the sole judge of life or death, presents an aspect and a danger of arbitrariness to which American history has responded by the all-but-ubiguitous involvement of lay juries in the sentencing process – a "likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate." *Codispoti v. Pennsylvania*, 418 U.S. 506, 515 (1974).

Although the legislative trend away from judicial imposition of the death penalty was in part a response to the problem of jury nullification,[66] it also was mandated by the enormity of the issue in the context of contemporary standards of morality. *See Kinsella v. Singleton*, 361 U.S. 234, 249, 255 (1960) (dissenting and concurring opinion of Mr. Justice Harlan). Legislators across the nation determined, as did Congress, to shift "from a single judge to a jury of 12 the onus of inflicting the penalty of death," *United States v. Jackson*, 390 U.S. 570, 576 (1968), because, in the matter of life and death as in matters of fact going to the question of guilt or innocence:

> "If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."

Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The capital defendant was thereby assured that his fate

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[66]See pages 78-80 *infra.*

would be determined by a body representative of the full range of social strata and interests rather than by a judge who is trained and bound to enforce the law and who may well give less weight to mitigating evidence out of a reluctance to deprive the citizenry of any protection or retribution. In another context, this Court itself has similarly recognized that judges may be peculiarly poor repositories of " 'contemporary community values,' " *Woodson v. North Carolina, supra*, 428 U.S. at 295 (plurality opinion), quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968), in connection with specialized issues as to which judges' unique professional role may give them a unique professional outlook. *See Bloom v. Illinois*, 391 U.S. 194 (1968); *Codispoti v. Pennsylvania, supra.* That is surely the case with capital punishment. *See, e.g.*, KOESTLER, REFLECTIONS ON HANGING 21-40 (Amer. ed. 1957). An authoritative United Nations study has noted that:

> "[A]mong the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penologists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges."

UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) 64 (1968). And since, as a practical matter, judges impose the death penalty "somewhat

more often" than do juries, KALVEN & ZEISEL, THE AMERICAN JURY 436 (1966), the capital defendant's right to a jury verdict on the issue of penalty can be, in any given case, the basic right to life.

Moreover, the policy of placing the decision to take or spare life in the hands of the representatives of the people whom the law stands to protect, and whose retributive sentiments the law serves to channel, operates "to maintain a link between contemporary community values and the penal system – a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' " *Witherspoon v. Illinois, supra*, 391 U.S. at 520 n.15. The constitutional necessity for such a link seems plainly recognized by *Woodson v. North Carolina, supra,* and *Stanislaus Roberts v. Louisiana, supra.* When life is at stake, the involvement of lay jurors in the sentencing process " 'places the real direction of society in the hands of the governed . . . and not in . . . the government,' " Powell, *Jury Trial of Crimes*, 23 WASH. & LEE L. REV. 1, 5, (1966) citing 1 DE TOQUEVILLE DEMOCRACY IN AMERICA 282 (Reeve Transl. 1948). "In making [the sentencing] . . . determination, the jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in" seeking a defendant's death. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). Its involvement in capital sentencing, as in determinations of criminal guilt, properly reflects "a reluctance to entrust plenary powers over . . . life . . . to one judge or to a group of judges." *Duncan v. Louisiana, supra*, 391 U.S. at 156.

Petitioner's case amply demonstrates the importance of providing jury input in capital sentencing. For detailed scientific review has established that in many felony-murder non-triggerman cases, "[t]he jury rebels at imposing the death penalty for the vicarious criminal responsibility of the defendant." KALVEN & ZEISEL, THE AMERICAN JURY 443 (1966). Juries have been found to be quite capable of understanding and applying the felony murder rule for purposes of conviction; but when it comes to deciding whether to take the defendant's life for the misdeeds of another, juries are far less likely than judges to impose a death sentence. *Ibid.*[67] Thus, the potential value to petitioner in having a jury involved in her sentencing is by no means conjectural: it would have reflected a recognized community reluctance to execute this type of defendant, and might well have resulted in Sandra Lockett being spared rather than sentenced to die.

Jury determinations are "a significant and reliable objective index of contemporary values . . ." *Gregg v. Georgia, supra*, 428 U.S. at 181 (plurality opinion). At a time when society has rejected "the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life or habits of a particular offender,' " *Stanislaus Roberts v. Louisiana, supra*, 428 U.S. at 333 (plurality opinion), it is the only precise indicator of those standards.

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[67]The four non-triggerman death sentences reversed by the Florida Supreme Court in recent years (see note 54 *supra*) were all imposed by trial judges despite recommendations of life imprisonment by juries.

> "In our criminal courts the jury sits as the representative of the community; its voice is that of the society against which the crime was committed."[68]

That voice must constitutionally be heard on the question of whether life is to be taken in its behalf.

2. The Failure to Provide for Jury Input in the Capital Sentencing Process Will Result in Impermissibly Arbitrary Imposition of the Penalty of Death.

Mandatory death penalty provisions "withdrawing all sentencing discretion from juries in capital cases," fail "to provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences," *Woodson v. North Carolina, supra*, 428 U.S. at 302 (plurality opinion). This Court has so held because the fact "that American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes [makes] . . . it . . . only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict . . ." *Id.* at 302-03 (plurality opinion).

> "Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly." *Id.* at 303.

[68] *Williams v. New York*, 337 U.S. 241, 253 (1949) (dissenting opinion of Justice Murphy).

This argument is equally compelling where aggravating circumstances are built into the definitions of capital crimes. *Stanislaus Roberts v. Louisiana, supra*, 429 U.S. at 334-35 (plurality opinion). So long as the punishment determination is taken out of the hands of the jury, it is no less compelling where – as in Ohio – a jury's verdict of conviction triggers a death sentence, subject only to reduction upon a later judicial finding of the absence of three narrowly defined mitigating factors. For,

> "... there is a point at which the wide-spread imposition of drastically severe penalties arouses in ordinary men a sympathy for those accused of crime which leads them to refuse to participate in their infliction, as complainants, as witnesses, as jurors, and even as officials. When this result occurs, nullification ensues and the effect of severity of threatened punishment is greatly to increase its actual uncertainty as well as to provide a general hatred of the law which must culminate ultimately in its change."

Michael & Wechsler, *A Rationale of the Law of Homicide (II)*, 37 COLUM. L. REV. 1261, 1265 (1937). And

> "If the matter is consigned to the discretion of some other administrator, such as the judge, the danger of nullification by the jury remains, though it may be smaller than if an offensive penalty is legislatively prescribed. Whether or not that is so will depend upon the jury's guess as to what the judge is likely to do in the event of conviction."

Id. at 1267 n.19. The addition of this new uncertainty into the traditionally uncertain processes of trial, appeal and executive review of death sentences certainly

cannot minimize the incidence of nullification sufficiently to meet the concerns articulated in *Furman, Woodson* and *Stanislaus Roberts.*

3. Findings Regarding the Presence or Absence of Mitigating Circumstances are Findings of Fact as to Which a Defendant Has a Sixth Amendment Right to a Trial by Jury.

The determinations made by judges pursuant to Ohio Rev. Code Ann. Sec. 2929.04(B), are substantially different than those typically made by judges in the process of criminal sentencing. For, as we have pointed out in subsection II(A), *supra*, there can be no weighing of aggravating and mitigating circumstances, no consideration of whether the defendant before the court may or may not be rehabilitated,[69] no independent evaluation of "the character and record of the individual offender," *Stanislaus Roberts v. Louisiana, supra*, 428 U.S. at 304 (plurality opinion). The Section 2929.04(B) proceeding rather consists of the making of three factual determinations of the kind that juries were designed to make, have traditionally made, and must, if the right to trial by jury is to be safeguarded, be permitted to make. The determinations whether "the victim of the offense induced or facilitated it," and whether "it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation" are indistinguishable in kind from the

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[69] *Compare* Vernon's Tex. Code of Crim. Proc. Ann. Art. 37.071 (1975-1976 cum. supp.).

determination that the defendant was "under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force" and thus guilty of the lesser offense of voluntary manslaughter.[70] And the determination whether "the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity" is surely no different in kind than the determination whether the defense of insanity was in fact established.

A factual determination which separates those who will live from those who will die by the hand of the State is a determination so significant that the procedural safeguards surrounding its adjudication may not depend upon the form in which local law chooses to cast it, *cf. Codispoti v. Pennsylvania, supra*, 418 U.S. at 515-517. Since the State of Ohio has drawn a distinction between those who kill under statutorily defined mitigating circumstances and those who kill in the absence of such circumstances, and has determined that the death penalty is only applicable in the latter category of cases, it cannot constitutionally adjudicate the presence or the absence of those life-or-death circumstances in disregard of the constitutional principle that a criminal defendant is entitled to the judgment of his peers on factual controversies that significantly affect the degree of his criminal culpability. This obviously is not to say that all factors affecting criminal sentencing must be found by a jury. But where the determination of specific factual questions of the sort that juries commonly decide is

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[70]Ohio Rev. Code Ann. §2903.03 (Page 1975).

used as the basis for subjecting defendants to grossly and qualitatively different sentencing regimes, the State may not diminish the safeguards that ordinarily attend such determinations "simply because the determination involved . . . differs in some respects from the traditional assessment of whether the defendant engaged in a proscribed course of conduct," *Witherspoon v. Illinois, supra*, 391 U.S. at 521 n.20. After all, at stake here is a penalty which "is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina, supra*, 428 U.S. at 305.

In *United States v. Kramer*, 289 F.2d 909 (CA2 1961), Judge Friendly wrote that where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment," and where the presence of the aggravating circumstance substantially increases the severity of possible sentencing consequences,[71] it must be assumed that "the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing

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[71]The aggravating circumstance involved in *Kramer* (the fact that embezzled commercial paper exceeded $100 in value) increased the crime from a misdemeanor to a felony. *Id.* at 920.

judge."[72] *Id.* at 912.[73] This principle is no less valid in the case of mitigating factors of identical import. Where they are a matter of life or death, they must be decided by a jury.

D. Ohio Capital Sentencing Procedures Impermissibly Penalize Exercise of the Rights to Plead Not Guilty and to Have a Jury Trial.

Under Ohio law, if a defendant pleads not guilty to an indictment charging aggravated murder with a specification of aggravating circumstances,

> "[t]he trier of fact may be either a jury or, if waived, a three-judge panel; . . . If the defendant is found guilty of the charge and guilty of one or more of the specifications, a separate hearing is held before the trial judge [in a jury-tried case] or

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[72]The District of Columbia Circuit has held to the contrary regarding the ordinarily simplistic question of whether the defendant has been convicted of a prior felony where such a conviction triggers the operation of recidivist provisions. *Jackson v. United States*, 221 F.2d 883 (CADC 1955); *but see United States v. Bolden*, 514 F.2d 1301 (CADC 1975).

[73]The *Kramer* principle "is now well recognized." *United States v. DeVall*, 462 F.2d 137, 142 (CA5 1972). *See* SEVENTH CIRCUIT JUDICIAL CONFERENCE, JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, §20.04 (1965), cited in *United States v. Ditata*, 469 F.2d 1270, 1273 n.3 (CA7 1973):

> "The Government must prove the value of the property stolen because the law provides a greater penalty if the value of the property exceeds $100. . . . The value of the property stolen is a question of fact to be determined by jury."

> the three-judge panel [in a jury-waived case] to determine whether mitigating circumstances exist which preclude imposition of the death penalty.... The death penalty is to be imposed if the trial judge or the three-judge panel unanimously finds that none of the three possible mitigating factors has been established to exist by a preponderance of the evidence."

State v. Bayless, supra, 48 Ohio St.2d at 81-83, 357 N.E.2d at 1044.

As we have seen in subsection II(A), *supra*, the only outlet from the death penalty for a capital defendant convicted of aggravated murder upon a plea of not guilty is either (1) a failure of the jury (or three-judge panel) to find factually the existence of a statutory aggravating circumstance, or (2) the finding by the court (or three-judge panel) of one or more of Ohio's three extremely narrow mitigating circumstances. If any aggravating circumstance and no mitigating circumstance is found, the death penalty *must* be imposed. Ohio Rev. Code Ann. Sec. 2929.03(C), (E). Thus in petitioner's case the trial judge, failing to find any legally cognizable mitigating circumstance, had no choice other than to sentence Sandra Lockett to die:

> "the Court has no alternative, whether the Court likes the law or not, the Court has to enforce the law as he sees it and he interprets it, and the Court will do so [by sentencing petitioner to death]."

A.148.

Had petitioner relinquished her constitutional right to a trial and pleaded guilty, however, the trial judge would have had "an alternative." He would not have been restricted by Ohio's rigid aggravating-mitigating

circumstances scheme, but could have imposed a life sentence for any reason that he thought fitting, "in the interests of justice." Ohio Rule of Criminal Procedure 11(C)(3) provides in relevant part:

> "If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications [of aggravating circumstances] and impose sentence [of life imprisonment] accordingly, in the interests of justice."

Thus, as the Ohio Supreme Court has recognized:

> "... while a defendant who pleads guilty or no contest to an indictment containing one or more specifications may obtain dismissal of such specification and thus avoid the death sentence if the trial judge finds the dismissal to be in the interests of justice, a defendant who pleads not guilty must rely on the court finding the presence of one of the mitigating circumstances, enumerated in R. C. 2929.04(B), to avoid the death sentence."

State v. Weind, 50 Ohio St.2d 224, 227, 364 N.E.2d 224, 228 (1977).

Moreover, had petitioner elected to waive trial by jury upon her plea of not guilty, she could have been sentenced to death only if a "panel of three judges unanimously [found] ... that none of the [statutory] mitigating circumstances ... is established by a preponderance of the evidence." Ohio Rev. Code Ann. Sec. 2929.03(E). The benefit of trial of the mitigating-circumstances issue by a multi-judge panel which cannot impose a death sentence in the absence of unanimity is obviously considerable:

> "A multi-judge court offers an opportunity for disagreement wholly lacking in a single judge. With

> such an issue as the death penalty involved, the possibility and availability of disagreement are advantages that cannot be disregarded."

Rainsburger v. Fogliane, 380 F.2d 783, 785 (CA9 1967).[74]

In United States v. Jackson, 390 U.S. 570 (1968), this Court held that the rights to plead not guilty and to have a jury trial are unconstitutionally diminished when separate and more lenient sentencing standards are established for cases in which these rights are waived. *See also Funicello v. New Jersey*, 403 U.S. 948 (1971) (*per curiam*). *Atkinson v. North Carolina*, 403 U.S. 948 (1971) *(per curiam)*. Such a scheme "needlessly encourages" the waiver of the rights to have one's guilt determined by a trial and by a jury. *United States v. Jackson, supra*, 390 U.S. at 583. Ohio's statutes and rules of court governing the trial of capital cases provide a similarly needless and effective encouragement of waiver of federal Fifth and Sixth Amendment rights, and accordingly they cannot withstand scrutiny under *Jackson.*

The Ohio Supreme Court has attempted to reconcile Rule 11(C)(3) with *Jackson* by noting that the rule does not absolutely mandate judicial leniency, whereas the statute at issue in *Jackson* precluded imposition of a death penalty upon a plea of guilty. *State v. Weind, supra*, 50 Ohio St.2d at 228-29, 364 N.E.2d at 229. However, this merely indicates that the "needless

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[74]The court added: "The fact that a single judge may be reluctant to assume the awesome solitary choice between life and death cannot weigh in the balance. Judges are presumed to have the fortitude to carry out their responsibilities." *Ibid.*

encouragement" to plead guilty might have been somewhat stronger under the provision at issue in *Jackson*; it certainly does not establish that such encouragement is absent under Ohio R. Crim. P. 11(C)(3). Matters of degree offer no available distinction where "[t]he inevitable effect of any such provision is . . . to discourage assertion of the Fifth Amendment right to plead not guilty and to deter exercise of the Sixth Amendment right to demand jury trial. [Ohio's procedures have] . . . no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, [75] [and are] . . . patently unconstitutional." *United States v. Jackson, supra*, 390 U.S. at 581, quoted with approval in *Gregg v. Georgia, supra*, 428 U.S. at 192 n.41.

E. Ohio Capital Sentencing Procedures Impermissibly Shift to the Defendant Convicted of Aggravated Murder with Specifications the Risk of Non-Persuasion in Proving Facts Which Distinguish Those Who May Live from Those Who Must Die.

We have discussed in subsections A-D II(A)-(D) *supra* the nature of the inquiry conducted at the mitigation

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[75]There appears no reason why Ohio capital defendants who elect a jury trial should be denied the safeguard of a unanimous three-judge panel at the mitigating-circumstances hearing, or why defendants who choose to contest their guilt should be denied judicial consideration upon a motion to strike the findings of aggravating circumstances "in the interests of justice."

phase of an Ohio capital trial. This is a proceeding at which three specific factual determinations are made, relating to the mental capacity of the defendant and two narrow features of his offense. On the basis of these factual determinations, convicted defendants are assigned to imprisonment or condemned to die at the hand of the State. Yet upon these three factual determinations, framed in the form of mitigating circumstances, Ohio law requires the defendant to bear the risk of non-persuasion. If the evidence is indecisive on these life-or-death questions, the defendant must be put to death. Ohio Rev. Code Ann. Sec. 2929.04(B); *State v. Royster, supra,* 48 Ohio St.2d at 389, 358 N.E.2d at 622; *State v. Downs*, 51 Ohio St.2d 47, 55, 364 N.E.2d 1140, 1145-46 (1977).[76]

The federal constitutional question raised by this allocation of the burden of proof takes shape within the framework of the particular Ohio death-sentencing process as a whole. Unlike many other States, Ohio does not have an open-ended roster of "mitigating circumstance" as to which convenience might dictate that the burden of going forward (or even perhaps the burden of persuasion) should be cast upon a defendant who is on trial for his life. Ohio has a specific, statutorily-defined, narrow and exclusive catalogue of

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[76]In *Downs*, the Ohio Supreme Court substituted this formulation for the stronger language found in its opinion in petitioner's case, which had stated that she bore the burden of proof. *See State v. Lockett, supra*, 49 Ohio St.2d at 65-66, 67, 358 N.E.2d at 1074, 1075; A. 211-12, 213. However, the court found that petitioner had not been disadvantaged thereby. *State v. Downs, supra*, 51 Ohio St.2d at 53; 364 N.E.2d 1144-45.

"mitigating circumstances." There are only three of them. The prosecution is therefore put on notice what they are; and, because each of them is closely akin to an issue that is likely to arise at the guilt phase of the trial if the facts of any case call a mitigating circumstance into question (insanity or mental deficiency, duress, and victim inducement), the prosecution will ordinarily have investigated the facts and be prepared to offer proof on each of them. These are not broad issues of character, comparative culpability, penology or judgment unlike those that are the grist of the mill of the criminal process. They are issues of fact that involve precisely the same fact-finding processes and risks of error as the matters of fact that the traditions of Anglo-American law have long found it appropriate to require the prosecution to prove beyond a reasonable doubt. The only functional distinction is this: in a first degree murder case where one aggravating circumstance has been found, the determination of the existence of a mitigating circumstance spells the difference between a mandatory death sentence and life.

Such determinations, made for such a purpose in a criminal trial, cannot escape the command of the Constitution that the State which establishes any distinction of preponderant importance in the assessment of criminal culpability must "require the prosecution to establish beyond a reasonable doubt the fact[s] upon which it turns." *Mullaney v. Wilbur*, 421

U.S. 684, 698 (1975).[77] "Because of [the] . . . qualitative difference [between a sentence of death and one of life imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina, supra* 428 U.S. at 305 (plurality opinion). "The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error," *In Re Winship*, 397 U.S. 358, 363 (1970); and is necessary to reduce the same risk in the infliction of the extreme penalty of death, as to which any avoidable error would be intolerable. *See Gardner v. Florida, supra.*

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account, where one party has at stake an interest of transcending value . . . this margin of error is reduced as to him by the process of placing on the other party the burden [of proof] . . . beyond a reasonable doubt."

Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

It can hardly be denied that the capital defendant has at stake an interest of transcendent value. Nevertheless, Ohio has decreed that *he* must bear the

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[77] *Patterson v. New York*, ____ U.S. ____, 53 L.Ed.2d 281 (1977), does not vitiate the command of *Mullaney* in this context. Surely, requiring the State to prove the nonexistence of the small and finite number of mitigating circumstances present here, in all limited number of mitigation hearings held each year in Ohio capital cases, would not be ". . . too cumbersome, too expensive and too inaccurate," 53 L.Ed.2d at 291, in view of the manifest "interest in reliability" of factual determinations that are "decisive [of] . . . life . . . and . . . death," *Gardner v. Florida, supra*, 430 U.S. at 359 (plurality opinion).

burden of persuasion of the facts on which his life depends, and must die even though it is as likely as not that those facts are true and that they warrant his salvation even under the narrow calculus of the Ohio statute. This Court should not permit such a sentencing system to stand.

CONCLUSION

The rigidity of the Ohio capital sentencing process, its isolation from the conscience of the community, its chilling effect upon the rights to plead not guilty and to trial by jury, its allocation to the defendant of the burden of establishing life-or-death facts, and the combined prejudicial effect of these factors upon a young woman who has not herself engaged in the deliberate taking of human life, require that Sandra Lockett's sentence of death be set aside by this Court.

III.

THE EXCLUSION FOR CAUSE OF FOUR VENIREMEN ON ACCOUNT OF THEIR CONSCIENTIOUS AND RELIGIOUS SCRUPLES AGAINST CAPITAL PUNISHMENT VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

Since " 'one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system,' " *Gregg v. Georgia, supra*, 428 U.S. at 181

(plurality opinion), the for-cause exclusion of prospective jurors on the grounds of their conscientious and religious scruples against the death penalty must be narrowly circumscribed in order to prevent violation of a capital defendant's Sixth Amendment right to a jury that is selected "from a representative cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). The Sixth Amendment right to a representative jury[78] postdates,[79] but underscores the

[78] *In Taylor v. Louisiana, supra*, 419 U.S. at 530-531, this Court eloquently described the reasons why juries should be drawn from as broad a section of the community as possible:

> "We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power – to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. 'Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.' "

The Ohio Supreme Court has similarly recognized the importance of selecting juries from a wide cross section of the community. *See State v. Bayless, supra*, 48 Ohio St.2d at 90, 357 N.E.2d at 1048; *State v. Strodes*, 48 Ohio St.2d 113, 115, 357 N.E.2d 375, 377 (1977).

[79] *Duncan v. Louisiana*, 391 U.S. 145 (1968) was decided two weeks before *Witherspoon*, but *Duncan* was held non-retroactive,

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importance of, the basic principles recognized by this Court's earlier decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Cardinal among these is the proposition that systematic exclusion of death-scrupled veniremen cannot be constitutionally justified upon "any broader basis," *id.* at 522 n.21, than is indispensable to accomplishing the legitimate purposes for which the screening of the jury is being conducted. Thorough and careful voir-dire inquiry of the sort which is required to make a prospective juror's disqualification upon some legitimate ground "unmistakably clear" before he is excused, *ibid.*, may be less convenient than simply "swe[eping] from the jury all who [have] expressed conscientious or religious scruples against capital punishment and all who [have] opposed it in principle," *id.* at 520. But the "administrative convenience in dealing with [such veniremen] . . . as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials." *Taylor v. Louisiana, supra*, 419 U.S. at 535.

Under Ohio's present capital punishment procedure, the jury does not impose the death penalty and is supposed to have nothing at all to do with determina-

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(footnote continued from preceding page)
DeStefano v. Woods, 392 U.S. 631 (1968); and Witherspoon's own trial, of course, long predated *Duncan*. With the exception of *Davis v. Georgia*, 429 U.S. 122 (1976), all of the cases in which this Court has applied *Witherspoon* have involved pre-*Duncan* trials. *See Maxwell v. Bishop*, 398 U.S. 262 (1970); *Boulden v. Holman*, 394 U.S. 468 (1969); *Mathis v. New Jersey*, and companion cases, 403 U.S. 946-948 (1971)(*per curiam*).

tion of punishment.[80] In this setting, the wholesale exclusion of veniremen opposed to the death penalty – even those implacably opposed and unable personally to vote to impose a death sentence – would surely violate a capital defendant's right to a "jury truly representative of the community," *Smith v. Texas*, 311 U.S. 128, 130 (1940); *see Taylor v. Louisiana, supra*, 419 U.S. at 534, because these exclusions would be based on grounds irrelevant to any task the jury was called upon to perform.[81] The only specifically relevant ground for

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[80] *Cf. State v. Bayless, supra*, 48 Ohio St.2d at 85, 357 N.E.2d at 1045:

> "More clearly than any of the states whose statutes were reviewed by the high court [in *Gregg v. Georgia*, 428 U.S. 153 (1976), and companion cases], Ohio has attempted to insulate the determination of guilt and of sentence from any likelihood of jury arbitrariness. The jury is directed to determine only guilt or innocence and whether the defendant is guilty beyond a reasonable doubt of one or more aggravating factors specified in the indictment. The ambit of their responsibilities is thus virtually the same as in any other criminal trial."

[81] In *State v. Bayless, supra*, 48 Ohio St.2d at 88, 357 N.E.2d at 1046, the Ohio Supreme Court noted that since "Ohio's statutory provisions for imposing capital punishment has [sic] taken the sentencing decision out of the juror's hands," it could be argued that "inquiry concerning their potential opposition to capital punishment is improper and irrelevant to the jury's limited mission of determining only guilt or innocence, not punishment." The court concluded that "[t]hat argument would have some force if a trial judge excused jurors for cause solely because of their opposition to capital punishment, and to allow such challenges because of a venireman's ethical and political beliefs would unjustifiably exclude a large group of potential jurors and deprive the defendant and society as a whole of a jury

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exclusion would be that jurors' "attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*" *Witherspoon v. Illinois, supra*, 391 U.S. at 522-23 n.21 (emphasis in original).[82] But before a juror could be

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which is a representative cross-section of the community." *Ibid.* Indeed, an Ohio Court of Appeals has held that death-qualification of the jury is improper under the 1975 Ohio capital punishment statute.

> "[I]t becomes obvious that no longer does the jury in capital offenses determine the punishment to be meted out. The jury's determination of guilt as to specifications is not a discretionary determination, it is a determination based upon proof. Since the penalty of death is no longer a matter to be determined by the jury, it does not then follow that the jurors should be questioned relative to their scruples about capital punishment."

State v. Strub, 48 Ohio App.2d 57, 2 Ohio Ops.3d 40, 42 (Ct.Ap. Columbiana Co. 1975).

[82]Although the Ohio Supreme Court has asserted that the *Witherspoon* jury-selection standards are "dictum as applied to a statutory scheme, such as Ohio's, which does not permit the jury to consider sentencing," *State v. Bayless, supra*, 48 Ohio St.2d at 91-92, 357 N.E.2d at 1048, it has upheld the exclusion for cause of death-scrupled jurors, not only in petitioner's case, but in *State v. Bayless, supra*, 48 Ohio St.2d at 87-94, 357 N.E.2d at 1046-1049; *State v. Roberts*, 48 Ohio St.2d 221, 222-23, 358 N.E.2d 530, 532 (1977); and *State v. Lane*, 48 Ohio St.2d 77, 79-80, 358 N.E.2d 1081, 1085 (1977), on the ground that *Witherspoon* approved " 'the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt,' " *State v. Bayless, supra*, 48 Ohio St.2d at 92, 357 N.E.2d at 1048 (quoting *Witherspoon v. Illinois, supra*, 391 U.S. at 513). The Ohio Supreme Court's rationale was most fully articulated in

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struck for cause upon this ground consistently with *Taylor* and the teaching of *Witherspoon*, his inability to determine guilt fairly would have to be made "unmistakably clear." 391 U.S. at 522 n.21.[83]

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State v. Bayless: "The essential purpose of the jury in our [state] legal system is to determine the facts according to law fairly and impartially, and the trial court [should] exclud[e] only those potential jurors whose views on capital punishment preven[t] them doing so. . . . [While] a juror's opinion concerning capital punishment has no more direct relevance to his task than any of the other opinions which, taken as a whole, form his individual outlook on life, . . . [a] juror who, because of his opinion for or against capital punishment, cannot be fair and impartial in determining guilt or innocence, the only task which the General Assembly has set him to, may properly be excused for cause," 48 Ohio St. at 89, 92, 93, 357 N.E.2d at 1047, 1049. The *Witherspoon* requirements do not, of course, apply only to those procedures under which the jury itself imposes sentence. In *Witherspoon* the Court noted that a few years after Witherspoon's trial, the Illinois legislature had empowered a trial judge to reject a jury recommendation of death. 391 U.S. at 518 n.12. The Court commented however that "nothing in our decision turns upon whether the judge is bound to follow [the jury's] . . . recommendation." *Ibid.*

[83]The test for exclusion in Ohio should be particularly stringent because, as the Ohio Supreme Court has observed, the likelihood of jurors making biased decisions concerning guilt to avert a speculative death sentence is remote:

> "The possibility does exist, of course, that jurors might disregard their oaths and vote upon the aggravating specifications according to whether they believe the defendant deserves the death penalty, but that possibility does not seem a substantial one. . . . The likelihood that prejudice, enmity, bias or sympathy would significantly affect the jury's findings of fact on such issues [the existence of specified aggravating circumstances] appears slight."

State v. Bayless, supra, 48 Ohio St.2d at 85, 357 N.E.2d at 1045.

At petitioner's trial, four venire members were excluded for cause on account of their sentiments concerning capital punishment. The relevant *voir dire* examination is set forth at pages 22-25 n.13 *supra.* Obviously, these prospective jurors were struck after only the most perfunctory and hazy examination of their ability to cast a fair and impartial vote on the question of petitioner's guilt. Without suitable explanation or inquiry, the trial judge insisted that each who opposed capital punishment state whether he could or could not "take an oath," and then excluded all who said they couldn't. This simply does not meet the stringent *Witherspoon-Taylor* standards for exclusion. *And see Wigglesworth v. Ohio*, 403 U.S. 947 (1971) (*per curiam*), *rev'g State v. Wigglesworth*, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969); *Pruett v. Ohio*, 403 U.S. 946 (1971) (*per curiam*), *rev'g State v. Pruett*, 18 Ohio St.2d 167, 248 N.E.2d 605 (1969).

The proceedings were as follows: The prosecuting attorney first asked the venire whether any prospective juror's conscientious scruples against capital punishment were so strong that he or she could "not sit, listen to the evidence, listen to the law, make their determination solely upon the evidence and the law without considering the fact that capital punishment is only a possibility in this case?" A.9. The panel members were not asked whether any views they might have on capital punishment would prevent them from making an impartial determination of petitioner's guilt,[84] but were

[84]It is difficult to imagine that *any* juror who knew the possible penalties for aggravated murder in Ohio (and the prosecuting attorney had just informed them of these penalties, A. 8-9,) could avoid "considering" the consequences of their verdict of guilt or innocence. The point, of course, was whether such consideration would affect their ability to determine *guilt* impartially.

asked at most whether "anyone . . . realizing that there's a possibility [of the imposition of the death penalty has] any qualms whatsoever about fairly and impartially deciding this case?" *Ibid.*

This line of examination was not, in any event, followed up because the trial court then took over and proceeded on a different tack. The judge inquired of the jurors who had indicated some conscientious scruples whether "you feel that you could take an oath to well and truely [sic] try this case because you have to take an oath and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?" A.10. The nature and wording of this oath and the duties it entailed were not further explained, nor was its possible consistency with "strong" convictions regarding "a possibility . . . in regard to capital punishment." Venireman Smith indicated that he could not take the oath because of his "religious conviction": "I just don't believe in capital punishment," A. 10; and he was excused for cause without further examination, A. 12. Venire member Minnie Lee, when asked by the court whether she "[c]ould . . . take an oath in this case because of your convictions in relation to capital punishment," responded: "I wouldn't like to because I don't believe in capital punishment." The court continued, "Well my question is, would you and could you take an oath and would you follow your oath?" Mrs. Lee replied, "If I took it, I'd follow it but I wouldn't want to take it, not with capital punishment." The court's only rejoinder was to insist: "I still have to ask you directly, Minnie, would you take the oath, now that you know

the situation?" Mrs. Lee responded "No," and was excused. A. 11. Finally, venire members Tomaselli and Yakubik were excluded for cause on the basis of a single question as to whether they could take "the oath," and their negative answers, A. 11-12.[85]

These questions with regard to "the oath" were inherently ambiguous because the requirements of the oath were never explicitly stated. Insofar as the oath presumably required a venireman to follow "the law," the questions could only have been confusing, since the jurors had been explicitly told, A. 6, 8-9, that they would not have any responsibility for imposing sentence and that there was only a "possibility" that the death penalty would be imposed. At no point were the excluded venire members asked whether their conscientious scruples would prevent them from making an impartial decision as to petitioner's *guilt.* The trial court's failure to focus the inquiry and to determine whether in fact these jurors were biased on the issue of guilt or innocence by their feelings concerning the death penalty resulted in the exclusion of venire members Smith, Lee, Tomaselli, and Yakubik without demonstration that their presence on the jury would jeopardize in any way the State's interest in a fair and impartial trial. It was therefore unjustifiable, and by distorting the representative character of petitioner's jury, it violated her rights under the Sixth and Fourteenth Amendments.

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[85]The referrent of the trial judge's phrase, "now that you know the situation" is unclear since no further explanation of the juror's duties and obligations had been provided.

IV.

THE OHIO SUPREME COURT, BY GIVING RETROACTIVE APPLICATION TO A NEW CONSTRUCTION OF OHIO REVISED CODE SECTION 2923.03(A) GOVERNING COMPLICITY, DENIED PETITIONER'S RIGHT TO FAIR WARNING OF A CRIMINAL PROHIBITION AND THEREBY DEPRIVED HER OF HER LIFE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Prior to January 1, 1974, when a new criminal code became effective in Ohio, an aider and abettor was subjected to the same criminal liability as the principal offender, whether or not he participated in the *mens rea* of the principal offender regarding the offense. *Stephens v. State*, 42 Ohio St. 150 (1884); *Goins v. State*, 46 Ohio St. 457, 21 N.E., 476 (1889); *Woolweaver v. State*, 50 Ohio St. 277, 34 N.E. 352 (1893); *State v. Doty*, 94 Ohio St. 258, 113 N.E. 811 (1916). These decisions were based upon former Ohio Rev. Code Sec. 1.17 and its predecessors:

> "Any person who aids, abets or procures another to commit an offense may be prosecuted and punished as if he were the principal offender."

On January 1, 1974, however, Ohio Rev. Code Ann. Sec. 2923.03(A) took effect providing that:

> "No person, *acting with the kind of culpability required for the commission of an offense*, shall do any of the following:
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> * * *
>
> (2) Aid or abet another in committing the offense."

(Emphasis added.)[86] This provision was based upon the work of the Ohio Legislative Service Commission which had specifically disapproved the prior case law holding that "those engaged in a common enterprise are each responsible for the acts of the other in pursuance of a common enterprise."[87] The Commission's recommendation that criminal liability for complicity require proof of an aider and abettor's individual culpability was adopted in the final report to the Ohio Legislature which became part of the *Proposed Ohio Criminal Code.*[88] The present complicity section, 2923.03(A)(2), was enacted verbatim from the proposed code.

Nonetheless, the Ohio Supreme Court, by a vote of 4-3, affirmed petitioner's conviction, under an interpretation of the new statute which rendered its "culpability" requirement nugatory:

> "The record establishes that the appellant participated in the planning and commission of the

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[86]The nature of the culpability required is further defined by Ohio Rev. Code Ann. Sec. 2901.21(A)(2), also part of the new criminal code, which provides in pertinent part:

> "... a person is not quilty of an offense unless ...
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> * * *
>
> (2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense."

[87]OHIO LEGISLATIVE SERVICE COMMISSION STAFF, COMPLICITY: ACCOUNTABILITY FOR CONDUCT OF ANOTHER PERSON (Memorandum to Criminal Law Technical Committee, November 14, 1966) p. 10.

[88]TECHNICAL COMMITTEE TO STUDY OHIO CRIMINAL LAWS AND PROCEDURES, FINAL REPORT (March, 1971) p. 246.

> robbery and acquiesced in the use of a deadly weapon to accomplish the robbery. Under these circumstances, *it might be reasonably expected* by all the participants that the victim's life would be endangered . . . Therefore, appellant, as well as the other participants *is bound by all the consequences naturally and probably arising from the furtherance of the conspiracy to commit the robbery.*"

State v. Lockett, supra, 49 Ohio St.2d at 62, 358 N.E.2d at 1072; A.208 (emphasis added). This surprising interpretation of Sec. 2923.03(A) permitted petitioner to be convicted despite the absence of any evidence in the record that she had in fact "the kind of culpability required for the . . . offense" of capital murder. It was undisputed at trial that petitioner never entered Sidney Cohen's store, and that she was outside in the car during the entire incident. Al Parker, the actual killer of Mr. Cohen and the State's main witness against petitioner, did not purport to connect her with any design to kill the pawnshop proprietor or anyone else. To the contrary, Parker testified that there was no such design – that the shooting occurred unintentionally as the result of Mr. Cohen grabbing Parker's gun. *See State v. Lockett, supra*, 49 Ohio St.2d at 67-68, 358 N.E.2d at 1075 (dissenting opinion); A. 214. Yet petitioner now stands convicted and sentenced to die as if she had entered the store and purposely shot Mr. Cohen herself.[89]

[89]It should be noted that Ohio does not adhere to the strict felony murder rule, but rather requires an intent or purpose to kill as an essential element of first degree murder. *See State v. Lockett, supra*, 49 Ohio St.2d at 58-59, 358 N.E.2d at 1070; A. 205. Petitioner's participation in the robbery of the pawnshop, without more, therefore cannot support her conviction of aggravated murder. *See also, State v. Farmer*, 156 Ohio St. 214, 102 N.E.2d 11 (1951).

Such an expansive and unpredictable appellate construction of Ohio's new complicity law, when applied retroactively to petitioner's case, deprived her of her right to fair warning of a criminal prohibition. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). As the Court further stated in *Bouie*:

> "If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta*, or to 'guess at [the statute's] meaning and differ as to its application, as in *Connally* [v. *General Construction Co.*, 269 U.S. 385 (1926)], the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

Ibid.[90]

In petitioner's case, of course, we are concerned not only with petitioner's conduct at the time of the

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[90]*See also United States v. Potts*, 528 F.2d 883, 886 (CA 9 1975) ("As Potts lacked notice of our subsequently revised view of the statute, 'due process fairness bars the retroactive judgment of his conduct using the expanded definition' "); *and United States v. Jacobs*, 513 F.2d 564, 566 (CA 9 1975).

offense charged, but also with her conduct at trial in twice rejecting offers of a non-capital disposition and sentence in return for a guilty plea. *See* pages 17-18, *supra*. *Cf. Raley v. Ohio*, 360 U.S. 423 (1959). While there are always inherent risks in deciding to go to trial rather than to accept a negotiated plea, due process surely demands that those risks not be unfairly increased by a *post-facto* appellate change in the law under which a criminal defendant reasonably expected that her case would be tried and decided. *Cf. Cole v. Arkansas*, 333 U.S. 196 (1948). The applicability of the fair notice doctrine in this context is perhaps best summarized in a recent comment by Professor Charles Black of the Yale Law School:

> "Now you may say that, after all, this woman knew she was guilty, and ought to have pled. I find death by electric shock a pretty stiff penalty even for such recalcitrance. But in truth the case is a perfect one of illustrating the fallacy of this whole line of argument. She knew she was guilty – of what? Two out of three psychiatrists who examined her put her intelligence below dead average, and one of these put her 'in the range of borderline mental retardation.' The third doctor rated her intelligence as 'slightly above average.' She was hooked on methadone at least; whether she was in withdrawal when these decisions on pleading were made does not appear. Could she have gotten into the Tulane Law School? Yet I think that is where she would have to be even to start trying to understand the theories on which she was held guilty of killing. My trembling guess is that she may have thought something like, 'Killing? Why I was in the car.' If that was what she was thinking, three of the seven judges in Ohio's highest court thought she was right, and

> was therefore *not* guilty on *either* of the pleas offered her – though they put their views in somewhat more artful terms. Are you really willing to keep running a system that electrocutes a woman like this because, with whatever feeble intellection, she made a guess as to her own guilt that was the same as the holding of three out of seven of Ohio's top judges?"

Black, *The Death Penalty Now*, 51 TULANE L. REV. 429, 435-36 (1977).

We have no quarrel, of course, with the Ohio Supreme Court's power to construe its state law as it sees fit – for the future. However, to apply the anomolous construction reached in petitioner's case retroactively without warning is to deprive her of her life in violation of fundamental fairness.

CONCLUSION

The judgment of the Ohio Supreme Court affirming petitioner's conviction and sentence to death should be reversed.

Respectfully submitted,

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APPENDIX A

POST-FURMAN DEATH SENTENCES REVIEWED BY THE SUPREME COURT OF THE STATE OF OHIO

1. *State v. Williams*, 51 Ohio St. 2d 112, 364 N.E.2d 1364 (1977)
2. *State v. Shelton*, 51 Ohio St. 2d 68, 364 N.E.2d 1152 (1977)
3. *State v. Downs*, 51 Ohio St. 2d 47, 364 N.E.2d 1140 (1977)
4. *State v. Jackson*, 50 Ohio St. 2d 253, 364 N.E.2d 236 (1977)
5. *State v. Weind*, 50 Ohio St. 2d 224, 364 N.E.2d 224 (1977)
6. *State v. C. Osborne*, 50 Ohio St. 2d 211, 364 N.E.2d 216 (1977)
7. *State v. Miller*, 49 Ohio St. 2d 198, 361 N.E.2d 419 (1977)
8. *State v. A. Osborne*, 49 Ohio St. 2d 135, 359 N.E.2d 78 (1977)
9. *State v. Lane*, 49 Ohio St. 2d 77, 358 N.E.2d 1081 (1977)
10. *State v. Lockett*, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976)
11. *State v. Edwards*, 49 Ohio St. 2d 31, 358 N.E.2d 1051 (1976)
12. *State v. Perryman*, 49 Ohio St. 2d 14, 358 N.E.2d 1040 (1976)
13. *State v. Royster*, 48 Ohio St. 2d 381, 358 N.E.2d 616 (1976)
14. *State v. Lytle*, 48 Ohio St. 2d 361, 358 N.E.2d 623 (1976)

15. *State v. Harris*, 48 Ohio St. 2d 351, 359 N.E.2d 67 (1976)
16. *State v. Hall*, 48 Ohio St. 2d 325, 358 N.E.2d 590 (1976)
17. *State v. Bates*, 48 Ohio St. 2d 315, 358 N.E.2d 584 (1976)
18. *State v. Bell*, 48 Ohio St. 2d 270, 358 N.E.2d 556 (1976)
19. *State v. Black*, 48 Ohio St. 2d 262, 358 N.E.2d 551 (1976)
20. *State v. Roberts*, 48 Ohio St. 2d 221, 358 N.E.2d 530 (1976)
21. *State v. Hancock*, 48 Ohio St. 2d 147, 358 N.E.2d 273 (1976)
22. *State v. Woods*, 48 Ohio St. 2d 127, 359 N.E.2d 1059 (1976)
23. *State v. Reaves*, 48 Ohio St. 2d 127, 359 N.E.2d 1059 (1976)
24. *State v. Strodes*, 48 Ohio St. 2d 113, 357 N.E.2d 375 (1976)
25. *State v. Bayless*, 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976)

APPENDIX B

Methodological Note:

This survey was conducted by searching for reported appellate opinions in all post-1954 cases of execution for homicide listed in the inventory in Bowers, *Executions in America* 201-400 (1974).

Reported decisions were found for 361 such cases. In two additional cases – Jose Luis Monge (Colorado) and Gary Gilmore (Utah) – there was no appeal but the facts have been widely reported.

Findings:

Of the 363 cases listed, it is clear in 347 that the individual executed for homicide personally committed a homicidal assault. In two the person executed had others commit a homicide for him. In eight other cases the facts were not reported in sufficient detail to determine whether the person executed was a non-triggerman.

The survey uncovered only six cases in which clearly identifiable non-triggermen were executed: Two in New York, two in New Jersey, one in Florida, and one in Tennessee. All six were executed in 1955.

ALABAMA

1. *Bowen v. State*, 274 Ala. 66, 145 So. 2d 421 (1962)
2. *Gosa v. State*, 273 Ala. 346, 139 So. 2d 326 (1962)

3. *Johnson v. State*, 272 Ala. 633, 133 So. 2d 53 (1961)
4. *Boggs v. State*, 270 Ala. 209, 116 So. 2d 903 (1959)
5. *Dockery v. State*, 269 Ala. 564, 114 So. 2d 294 (1959)
6. *Martin v. State*, 266 Ala. 290, 96 So. 2d 298 (1957)
7. *Johnson v. State*, 265 Ala. 360, 91 So. 2d 476 (1956)

ARIZONA

8. *McGee v. Arizona State Board of Pardons & Parole*, 92 Ariz. 317, 376 P.2d 779 (1962)
9. *State v. Silvas*, 91 Ariz. 386, 372 P.2d 718 (1962)
10. *State v. Robinson*, 89 Ariz. 224, 360 P.2d 474 (1961)
11. *State v. Fenton*, 86 Ariz. 111, 341 P.2d 237 (1959)
12. *State v. Craft*, 85 Ariz. 143, 333 P.2d 728 (1958)
13. *State v. Jordan*, 83 Ariz. 248, 320 P.2d 446 (1958)
14. *State v. Coey*, 82 Ariz. 133, 309 P.2d 260 (1957)
15. *State v. Thomas*, 79 Ariz. 158, 285 P.2d 612 (1955)
16. *State v. Folk*, 78 Ariz. 205, 277 P.2d 1016 (1954).

ARKANSAS

17. *Moore v. State*, 231 Ark. 672, 331 S.W.2d 841 (1960)

18. *Bracey v. State*, 231 Ark. 647, 331 S.W.2d 870 (1960)
19. *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959)
20. *Legett v. State*, 227 Ark. 393, 299 S.W.2d 59 (1959)
21. *Young v. State*, 230 Ark. 737, 324 S.W.2d 524 (1959)
22. *Hays v. State*, 230 Ark. 731, 324 S.W.2d 520 (1959)
23. *House v. State*, 230 Ark. 622, 324 S.W.2d 112 (1959)
24. *Walker v. State*, 229 Ark. 685, 317 S.W.2d 823 (1958)
25. *Lee v. State*, 229 Ark. 354, 315 S.W.2d 916 (1958)
26. *Moore v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
27. *Boyde v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
28. *Boone v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
29. *Byrd v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
30. *Smith v. State*, 227 Ark. 332, 299 S.W.2d 52 (1957)
31. *Jenkins v. State*, 222 Ark. 511, 261 S.W.2d 784 (1953)

CALIFORNIA

32. *People v. Mitchell*, 48 Cal. Rptr. 371 (1966)
33. *People v. Bentley*, 58 Cal. 2d 858 (1962)

34. *People v. Darling*, 58 Cal. 2d 15 (1962)
35. *People v. Ditson*, 57 Cal. 2d 415 (1962)
36. *People v. Garner*, 57 Cal. 2d 135 (1961)
37. *People v. Hughes*, 57 Cal. 2d 89 (1961)
38. *People v. Lane*, 56 Cal. 2d 868 (1961)
39. *People v. Carter*, 56 Cal. 2d 549 (1961)
40. *People v. Gonzalez*, 56 Cal. 2d 371 (1961)
41. *People v. Lindsey*, 56 Cal. 2d 324 (1961)
42. *People v. Combes*, 56 Cal. 2d 135 (1961)
43. *People v. Kendrick*, 56 Cal. 2d 71 (1961)
44. *People v. Rittger*, 55 Cal. 2d 849 (1961)
45. *People v. Robillard*, 55 Cal. 2d 88 (1960)
46. *People v. Baldonado*, 53 Cal. 2d 824 (1960)
47. *People v. Moya*, 53 Cal. 2d 819 (1960)
48. *People v. Duncan*, 53 Cal. 2d 803 (1960)[1]
49. *People v. Cartier*, 54 Cal. 2d 300 (1960)
50. *People v. Cooper*, 53 Cal. 2d 755 (1960)
51. *People v. Scott*, 53 Cal. 2d 558 (1960)
52. *People v. Wade*, 53 Cal. 2d 322 (1959)
53. *People v. Hooten*, 53 Cal. 2d 85 (1959)
54. *People v. Hamilton*, 52 Cal. 2d 636 (1959)
55. *People v. Jones*, 52 Cal. 2d 636 (1959)
56. *People v. Glatman*, 52 Cal. 2d 283 (1959)
57. *People v. Nash*, 52 Cal. 2d 36 (1959)
58. *People v. Linden*, 52 Cal. 2d 1 (1959)
59. *People v. Duncan*, 51 Cal. 2d 523 (1958)
60. *People v. Feldkamp*, 51 Cal. 2d 237 (1958)
61. *People v. Ward*, 50 Cal. 2d 702 (1958)
62. *People v. Bashor*, 48 Cal. 2d 763 (1957)
63. *People v. Dement*, 48 Cal. 2d 600 (1957)
64. *People v. Tipton*, 48 Cal. 2d 389 (1957)

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[1] Murder for hire.

65. *People v. Hardenbrook*, 48 Cal. 2d 345 (1957)
66. *People v. Cheary*, 48 Cal. 2d 301 (1957)
67. *People v. Johnston*, 48 Cal. 2d 78 (1957)
68. *People v. Riser*, 47 Cal. 2d 566 (1956)
69. *People v. Abbott*, 47 Cal. 2d 363 (1956)
70. *People v. Reese*, 47 Cal. 2d 112 (1956)
71. *People v. Morlock*, 46 Cal. 2d 141 (1956)
72. *People v. Caritativo*, 46 Cal. 2d 68 (1956)
73. *People v. Jordan*, 45 Cal. 2d 697 (1955)
74. *People v. Pierce*, 45 Cal. 2d 697 (1955)
75. *People v. Thomas*, 45 Cal. 2d 433 (1955)
76. *People v. Berry*, 44 Cal. 2d 426 (1955)
77. *People v. Cavanaugh*, 44 Cal. 2d at 252 (1955)
78. *People v. Zilbauer*, 44 Cal. 2d 43 (1955)
79. *People v. Barwell*, 44 Cal. 2d 16 (1955)
80. *People v. Caldwell*, 43 Cal. 2d 864 (1955)
81. *People v. Simpson*, 43 Cal. 2d 553 (1954)[2]
82. *People v. Graham*, 43 Cal. 2d 319 (1954)
83. *People v. Santo*, 43 Cal. 2d 319 (1954)
84. *People v. Baldwin*, 42 Cal. 2d 858 (1954)
85. *People v. Byrd*, 42 Cal. 2d 200 (1954)
86. *People v. Rupp*, 41 Cal. 2d 371 (1953)

COLORADO

87. *People v. Monge*, Executed June 7, 1967 (Did not appeal, but is reliably reported to have personally committed the homicide for which he was executed. See Burton, Pileup on Death Row 68-69 (1963)
88. *People v. Bizup*, 150 Colo. 5 (1962)

[2] Father had his children murder his wife.

89. *People v. Hammile*, 145 Colo. 577 (1961)
90. *People v. Wooley*, 145 Colo. 577 (1961)
91. *People v. Early*, 142 Colo. 462 (1960)
92. *People v. Leick*, 140 Colo. 564 (1959)
93. *People v. Graham*, 134 Colo. 290 (1956)
94. *People v. Martinez*, 134 Colo. 82 (1956)

CONNECTICUT

95. *State v. Davies*, 146 Conn. 137 (1959)
96. *State v. Wojculewicz*, 142 Conn. 676 (1955)
97. *State v. Taborsky*, 142 Conn. 619 (1955)
98. *State v. Maim*, 142 Conn. 113 (1955)
99. *State v. Lorain*, 141 Conn. 694 (1954)
100 *State v. Donahue*, 141 Conn. 656 (1954)

DISTRICT OF COLUMBIA

101. *Carter v. United States*, 96 U.S. App. D.C. 40 (1956)

FLORIDA

102. *Blake v. State*, 156 So. 2d 511 (Fla. 1964)
103. *Dawson v. State*, 154 So. 2d 318 (Fla. 1964)
104. *Lee v. State*, 141 So. 2d 257 (Fla. 1963)
105. *Leach v. State*, 136 So. 2d 329 (Fla. 1961)
106. *Hill v. State*, 133 So. 2d 68 (Fla. 1961)
107. *Johnson v. State*, 130 So. 2d 599 (Fla. 1961)
108. *Jefferson v. State*, 128 So. 2d 132 (Fla. 1961)
109. *Brooks v. State*, 117 So. 482 (Fla. 1960)
110. *Mackiewicz v. State*, 114 So. 2d 684 (Fla. 1959)
111. *Daniels v. State*, 108 So. 2d 755 (Fla. 1959)

112. *Frazier v. State*, 107 So. 2d 16 (Fla. 1958)
113. *Wither v. State*, 104 So. 2d 725 (Fla. 1958)
114. *Nelson v. State*, 97 So. 2d 250 (Fla. 1957)
115. *Everett v. State*, 97 So. 2d 241 (Fla. 1957)
116. *Long v. State*, 96 So. 2d 897 (Fla. 1957)
117. *Raulerson v. State*, 93 So. 2d 399 (Fla. 1957)
118. *Rhone v. State*, 93 So. 2d 80 (Fla. 1957)
119. *Ezzell v. State*, 88 So. 2d 280 (Fla. 1956)
120. *LaVoie v. State*, 84 So. 2d 593 (Fla. 1956)
121. *Barwicks v. State*, 82 So. 2d 356 (Fla. 1955)
122. *Ambrister v. State*, 78 So. 2d 876 (Fla. 1955)
123. *Anderson v. State*, 78 So. 2d 876 (Fla. 1955)
124. *Dyer v. State*, 78 So. 2d 402 (Fla. 1955)
125. *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955)[3]
126. *Gillard v. State*, 73 So. 2d 677 (Fla. 1954)

GEORGIA

127. *Jones v. State*, 219 Ga. 245 (1963)
128. *Pugh v. State*, 219 Ga. 166 (1963)
129. *Chandler v. State*, 219 Ga. 105 (1963)
130. *Dye v. State*, 218 Ga. 330 (1962)
131. *Smith v. State*, 218 Ga. 216 (1962)
132. *Wimis v. State*, 216 Ga. 350 (1960)
133. *Mullins v. State*, 216 Ga. 183 (1960)
134. *Davis v. State*, 215 Ga. 788 (1960)
135. *Albert v. State*, 215 Ga. 564 (1959)
136. *Johnson v. State*, 215 Ga. 448 (1959)
137. *Wilson v. State*, 215 Ga. 446 (1959)
138. *Bunkley v. State*, 215 Ga. 377 (1959)
139. *Wilson v. State*, 215 Ga. 282 (1960)

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[3] Non-triggerman in felony murder.

140. *Hill v. State*, 214 Ga. 794 (1959)
141. *Charlton v. State*, 214 Ga. 778 (1959)
142. *Woods v. State*, 214 Ga. 546 (1959)
143. *Murray v. State*, 214 Ga. 350 (1958)
144. *Dobbs v. State*, 214 Ga. 206 (1958)
145. *Adams v. State*, 214 Ga. 131 (1958)
146. *Golden v. State*, 213 Ga. 481 (1957)
147. *Dupree v. State*, 213 Ga. 348 (1957)
148. *Mullins v. State*, 213 Ga. 331 (1957)
149. *Toler v. State*, 213 Ga. 12 (1957)
150. *Elder v. State*, 212 Ga. 705 (1956)
151. *Styles v. State*, 212 Ga. 698 (1956)
152. *Cooper v. State*, 212 Ga. 367 (1956)
153. *Cochran v. State*, 212 Ga. 245 (1956)
154. *Turner v. State*, 212 Ga. 199 (1956)
155. *Philpot v. State*, 212 Ga. 79 (1955)
156. *Domingo v. State*, 211 Ga. 691 (1955)
157. *Hill v. State*, 211 Ga. 683 (1955)
158. *Jackson v. State*, 211 Ga. 490 (1955)
159. *Corbin v. State*, 211 Ga. 400 (1955)
160. *Fields v. State*, 211 Ga. 335 (1955)
161. *Morgan v. State*, 211 Ga. 172 (1954)
162. *Williams v. State*, 210 Ga. 207 (1953)

IDAHO

163. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957)

ILLINOIS

164. *People v. Ciucci*, 21 Ill. 2d 81, 171 N.E.2d 24 (1961)

165. *People v. Dukes*, 19 Ill. 2d 532, 169 N.E.2d 84 (1960)
166. *People v. Carpenter*, 11 Ill. 2d 60, 142 N.E.2d 11 (1957)

INDIANA

167. *State v. Kiefer*, 241 Ind. 176, 169 N.E.2d 723 (1960)

IOWA

168. *State v. Kelley*, 253 Iowa 1314, 115 N.W.2d 184 (1962)
169. *State v. Brown*, 253 Iowa 658, 113 N.W.2d 286 (1962)

KANSAS

170. *State v. Latham*, 190 Kan. 411, 375 P.2d 788 (1962)
171. *State v. York*, 190 Kan. 411, 375 P.2d 788 (1962)
172. *State v. Hickock*, 188 Kan. 473, 363 P.2d 541 (1961)
173. *State v. Smith*, 188 Kan. 473, 363 P.2d 541 (1961)
174. *State v. Andrews*, 187 Kan. 458, 375 P.2d 739 (1960)

KENTUCKY

175. *Commonwealth v. Moss*, 332 S.W.2d 650 (Ky. 1956)

176. *Commonwealth v. Bowman*, 290 S.W.2d 814 (Ky. 1956)
177. *Commonwealth v. DeBerry*, 289 S.W.2d 495 (Ky. 1956)
178. *Commonwealth v. Nichols*, 283 S.W.2d 184 (Ky. 1955)
179. *Commonwealth v. Milam*, 275 S.W.2d 921 (Ky. 1955)
180. *Commonwealth v. Merrifield*, 268 S.W.2d 405 (Ky. 1954)
181. *Commonwealth v. Tarrence*, 265 S.W.2d 52 (Ky. 1954)
182. *Commonwealth v. Tarrence*, 265 S.W.2d 40 (Ky. 1953)

LOUISIANA

183. *State v. Ferguson*, 240 La. 593, 124 So. 2d 558 (1960)
184. *State v. Faciane*, 233 La. 1028, 99 So. 2d 333 (1957)[4]
185. *State v. McMiller*, 233 La. 1028, 99 So. 2d 333 (1957)[4]
186. *State v. Bailey*, 233 La. 39, 96 So. 2d 34 (1957)
187. *State v. Sheffield*, 232 La. 53, 93 So. 2d 691 (1957)
188. *State v. Bush*, 230 La. 181, 88 So. 2d 19 (1956)[5]
189. *State v. Washington*, 230 La. 181, 88 So. 2d 19 (1956)[5]

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[4] McMiller was involved along with 2 others and Faciane in a robbery of a store. Faciane shot the storekeeper's son. The opinion does not detail McMiller's degree of participation.

[5] No facts given in decision.

190. *State v. Chinn*, 229 La. 984, 87 So. 2d 315 (1956)
191. *State v. Brazille*, 226 La. 254, 75 So. 2d 856; 229 La. 600, 86 So. 2d 208 (1956)[6]

MARYLAND

192. *State v. Lipscomb*, 223 Md. 599, 165 A.2d 918 (1960)
193. *State v. Shockley*, 218 Md. 491, 148 A.2d 371 (1959)
194. *State v. Kier*, 216 Md. 513, 140 A.2d 896 (1958)
195. *State v. Daniels*, 213 Md. 90, 131 A.2d 267 (1957)
196. *State v. Thomas*, 206 Md. 575, 112 A.2d 913 (1955)

MISSISSIPPI

197. *Jackson v. State*, 249 Miss. 202, 161 So. 2d 660 (1964)
198. *Slyter v. State*, 246 Miss. 821, 152 So. 2d 702 (1963)
199. *Anderson v. State*, 246 Miss. 402, 149 So. 2d 489 (1963)
200. *Simmons v. State*, 241 Miss. 481, 130 So. 2d 860 (1961)
201. *Stokes v. State*, 240 Miss. 453, 128 So. 2d 341 (1961)
202. *Goldsby v. State*, 240 Miss. 647, 123 So. 2d 429 (1960)

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[6] No facts given in decisions.

203. *Dean v. State*, 234 Miss. 376, 106 So. 2d 501 (1958)
204. *Wetzel v. State*, 232 Miss. 366, 98 So. 2d 767 (1957)
205. *Thompson v. State*, 231 Miss. 624, 97 So. 2d 626 (1956)
206. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626 (1956)
207. *Jones v. State*, 228 Miss. 458, 88 So. 2d 91 (1956)
208. *Townsel v. State*, 228 Miss. 110, 87 So. 2d 481 (1956)
209. *Sorber v. Wiggins*, 226 Miss. 693, 85 So. 2d 479 (1956)
210. *Russell v. State*, 226 Miss. 885, 85 So. 2d 585 (1956)
211. *Keeler v. State*, 226 Miss. 199, 84 So. 2d 153 (1955)
212. *Gilmore v. State*, 225 Miss. 173, 82 So. 2d 838 (1955)
213. *LaFontaine v. State*, 223 Miss. 562, 78 So. 2d 600 (1955)
214. *McNair v. State*, 223 Miss. 83, 77 So. 2d 306 (1955)
215. *Gallego v. State*, 222 Miss. 719, 77 So. 2d 321 (1955)
216. *Lewis v. State*, 222 Miss. 140, 75 So. 2d 448 (1954)
217. *Pope v. Wiggins*, 220 Miss. 1, 69 So. 2d 913 (1954)

MISSOURI

218. *State v. Anderson*, 386 S.W.2d 225 (Mo. 1963)
219. *State v. Tucker*, 362 S.W.2d 509 (Mo. 1963)
220. *State v. Moore*, 303 S.W.2d 60 (Mo. 1957)
221. *State v. Booker*, 276 S.W.2d 104 (Mo. 1955)

NEBRASKA

222. *Starkweather v. State*, 167 Neb. 477, 93 N.W.2d 619 (1958)

NEVADA

223. *Archibald v. State*, 77 Nev. 301, 362 P.2d 721 (1961)
224. *Steward v. State*, 346 P.2d 1083 (1959)

NEW JERSEY

225. *State v. Hudson*, 38 N.J. 364, 185 A.2d 1 (1961)
226. *State v. Ernst*, 32 N.J. 567, 161 A.2d 511 (1960)
227. *State v. Sturdivant*, 31 N.J. 165, 155 A.2d 771 (1959)
228. *State v. Stokes*, 19 N.J. 59, 115 A.2d 62 (1955)
229. *State v. A. Wise*, 19 N.J. 59, 115 A.2d 62 (1955)
230. *State v. H. Wise*, 19 N.J. 59, 115 A.2d 62 (1955)
231. *State v. Cruz*, 17 N.J. 572, 112 A.2d 247 (1955)[7]
232. *State v. Rios*, 17 N.J. 572, 112 A.2d 247 (1955)
233. *State v. Rodriguez*, 17 N.J. 572, 112 A.2d 247 (1955)[7]

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[7] Non-triggermen in felony murder.

234. *State v. Tune*, 17 N.J. 100, 110 A.2d 440 (1954)
235. *State v. Roscus*, 16 N.J. 415, 109 A.2d 1 (1954)
236. *State v. Monohan*, 16 N.J. 83, 106 A.2d 287 (1954)

NEW MEXICO

237. *State v. Nelson*, 65 N.M. 403, 338 P.2d 301 (1959)
238. *State v. Upton*, 60 N.M. 205, 290 P.2d 440 (1956)

NEW YORK

239. *People v. Mays*, 13 N.Y.2d 784, 192 N.E.2d 173 (1963)
240. *People v. Wood*, 12 N.Y.2d 69, 187 N.E.2d 116 (1962)
241. *People v. Miller*, 9 N.Y.2d 839, 175 N.E.2d 547 (1961)
242. *People v. Downs*, 8 N.Y.2d 860, 168 N.E.2d 710 (1960)
243. *People v. Philips*, 8 N.Y.2d 850, 203 N.Y.S.2d 900 (1960)
244. *People v. Chapman*, 8 N.Y.2d 809, 202 N.Y.S.2d 25 (1960)*
245. *People v. Flakes*, 8 N.Y.2d 806, 202 N.Y.S.2d 21 (1960)*
246. *People v. Green*, 8 N.Y.2d 806, 202 N.Y.S.2d 21 (1960)*

*In the cases marked by an asterisk, the reported opinion does not describe the facts of the case; the facts were obtained from the appellate briefs.

247. *People v. Vargas*, 7 N.Y.2d 555, 200 N.Y.S.2d 29 (1960)
248. *People v. Mason*, 7 N.Y.2d 891, 197 N.Y.S.2d 200 (1960)
249. *People v. Keith*, 6 N.Y.2d 880, 188 N.Y.S.2d 998 (1959)
250. *People v. Dawkins*, 6 N.Y.2d 814, 188 N.Y.S.2d 201 (1959)*
251. *People v. Richardson*, 5 N.Y.2d 767, 179 N.Y.S.2d 861 (1958)*
252. *People v. Dan*, 4 N.Y.2d 934, 175 N.Y.S.2d 174 (1958)*
253. *People v. LaMarca*, 4 N.Y.2d 925, 175 N.Y.S.2d 167 (1958)
254. *People v. Ecksworth*, 4 N.Y.2d 923, 175 N.Y.S.2d 164 (1958)
255. *People v. Turner*, 4 N.Y.2d 731, 171 N.Y.S.2d 119 (1958)*
256. *People v. Burke*, 3 N.Y.2d 985, 169 N.Y.S.2d 743 (1957)
257. *People v. Santiago*, 3 N.Y.2d 809, 166 N.Y.S.2d 9 (1957)
258. *People v. Taylor*, 2 N.Y.2d 1009, 163 N.Y.S.2d 617 (1957)*
259. *People v. Browne*, 2 N.Y.2d 842, 159 N.Y.S.2d 981 (1957)
260. *People v. Salemi*, 2 N.Y.2d 159, 159 N.Y.S.2d 972 (1957)
261. *People v. Reade*, 1 N.Y.2d 959, 154 N.Y.S.2d 27 (1956)

***In the cases marked by an asterisk, the reported opinion does not describe the facts of the case; the facts were obtained from the appellate briefs.**

262. *People v. Edwards*, 1 N.Y.2d 830, 153 N.Y.S.2d 213 (1956)
263. *People v. Newman*, 1 N.Y.2d 666, 150 N.Y.S.2d 196 (1956)
264. *People v. Byers*, 309 N.Y. 903, 134 N.E.2d 580 (1955)
265. *People v. Roye*, 309 N.Y. 903, 131 N.E.2d 578 (1955)
266. *People v. Roche*, 309 N.Y. 678, 128 N.E.2d 323 (1955)
267. *People v. Nichols*, 308 N.Y. 1038, 127 N.E.2d 869 (1955)*
268. *People v. Reed*, 308 N.Y. 1038, 127 N.E.2d 869 (1955)*
269. *People v. Rosario*, 308 N.Y. 723, 124 N.E.2d 337 (1954)
270. *People v. Wissner*, 303 N.Y. 856, 104 N.E.2d 917 (1952)*
271. *People v. Cooper*, 303 N.Y. 856, 104 N.E.2d 917 (1952)[8]*
272. *People v. Stein*, 303 N.Y. 856, 104 N.E.2d 917 (1952)[8]*

NORTH CAROLINA

273. *State v. Boykin*, 255 N.C. 432 (1961)
274. *State v. Burton*, 248 N.C. 559 (1958)
275. *State v. Conner*, 244 N.C. 109 (1956)
276. *State v. Scales*, 242 N.C. 400 (1955)

[8] Non-triggermen in felony murder.

*In the cases marked by an asterisk, the reported opinion does not describe the facts of the case; the facts were obtained from the appellate briefs.

OHIO

277. *State v. Griffin*, 180 N.E.2d 924 (1962)
278. *State v. Fenton*, 172 Ohio St. 2d 540 (1961)
279. *State v. Cosby*, 110 Ohio App. 222, 162 N.E.2d 126 (1960)
280. *State v. Byomin*, 106 Ohio App. 393, 154 N.E.2d 823 (1959)
281. *State v. Tannyhill*, 101 Ohio App. 466, 140 N.E.2d 332 (1956)
282. *State v. Allen*, 133 N.E.2d 167 (1956)

OKLAHOMA

283. *French v. State*, 416 P.2d 171 (1966)
284. *Dare v. State*, 378 P.2d 339 (1963)
285. *Doggett v. State*, 371 P.2d 523 (1960)
286. *Spence v. State*, 353 P.2d 1114 (1959)
287. *Loel v. State*, 300 P.2d 1013 (1956)
288. *Hendricks v. State*, 296 P.2d 205 (1956)
289. *Fairris v. State*, 287 P.2d 708 (1955)

OREGON

290. *State v. McGahuey*, 230 Or. 643, 371 P.2d 669 (1962)

PENNSYLVANIA

300. *Commonwealth v. Smith*, 405 Pa. 456, 176 A.2d 33 (1961)
301. *Commonwealth v. Schuck*, 401 Pa. 222, 164 A.2d 13 (1960)

302. *Commonwealth v. McCoy*, 401 Pa. 100, 162 A.2d 636 (1960)
303. *Commonwealth v. Graves*, 394 Pa. 429, 147 A.2d 416 (1959)
304. *Commonwealth v. Thompson*, 389 Pa. 382 (1959)
305. *Commonwealth v. Cole*, 384 Pa. 40 (1956)
306. *Commonwealth v. Gossard*, 383 Pa. 239, 117 A.2d 902; 123 A.2d 258 (1956)
307. *Commonwealth v. Wable*, 382 Pa. 80, 114 A.2d 334 (1955)
308. *Commonwealth v. Capps*, 382 Pa. 72, 114 A.2d 338 (1955)
309. *Commonwealth v. Thompson*, 381 Pa. 299 (1955)
310. *Commonwealth v. Lance*, 381 Pa. 293, 113 A.2d 290 (1955)
311. *Commonwealth v. Edwards*, 380 Pa. 52 (1954)

SOUTH CAROLINA

312. *State v. Young*, 119 S.E.2d 504 (S.C. 1961)
313. *State v. Britt*, 117 S.E.2d 379 (S.C. 1960); 111 S.E.2d 669 (S.C. 1959)[10]
314. *State v. Westbury*, 117 S.E.2d 379 (S.C. 1960); 111 S.E.2d 669 (S.C. 1959)[10]
315. *State v. Bullock*, 111 S.E.2d 657 (S.C. 1959)
316. *State v. Boone*, 90 S.E.2d 640 (S.C. 1955)
317. *State v. Chasteen*, 88 S.E.2d 880 (S.C. 1955)
318. *State v. Fuller*, 87 S.E.2d 287 (S.C. 1955)

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[10]It is unclear from the reported opinions as to which of these co-defendants shot the victim.

TENNESSEE

319. *Gibbs v. State*, 300 S.W.2d 890 (Tenn. 1957)
320. *Kirkendoll v. State*, 281 S.W.2d 243 (Tenn. 1955)
321. *Sullins v. State*, 281 S.W.2d 243 (Tenn. 1955)[11]

TEXAS

322. *Johnson v. State*, 378 S.W.2d 76 (Tex. Cr. App. 1964)
323. *Bradford v. State*, 372 S.W.2d 336 (Tex. Cr. App. 1963)
324. *Lavan v. State*, 363 S.W.2d 139 (Tex. Cr. App. 1963)
325. *Stein v. State*, 172 Tex. Crim. 248, 355 S.W.2d 723 (1962)
326. *Mosley v. State*, 172 Tex. Crim. 117, 354 S.W.2d 391 (1962)
327. *Wilson v. State*, 171 Tex. Crim. 573, 352 S.W.2d 114 (1961)
328. *Luton v. State*, 171 Tex. Crim. 441, 350 S.W.2d 853 (1961)
329. *Wiley v. State*, 171 Tex. Crim. 366, 350 S.W.2d [illegible] (1961)[12]
330. *[illegible]ath v. State*, 171 Tex. Crim. 209, 346 S.W.2d [illegible]46 (1961)
331. *Johnson v. State*, 169 Tex. Crim. 612, 336 S.W.2d 175 (1960)

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[11]Non-triggerman in felony murder.

[12]While it is unclear from the reported decision whether the victim was killed by Wiley or by co-defendant McDade or both, Wiley was executed whereas McDade was not.

332. *Stickney v. State*, 169 Tex. Crim. 533, 336 S.W.2d 133 (1960)
333. *Williams v. State*, 169 Tex. Crim. 370, 333 S.W.2d 846 (1960)
334. *Philpot v. State*, 169 Tex. Crim. 91, 332 S.W.2d 323 (1960)
335. *Moon v. State*, 169 Tex. Crim. 14, 331 S.W.2d 312 (1959)
336. *Moses v. State*, 168 Tex. Crim. 206, 328 S.W.2d 885 (1959)
337. *Smith v. State*, 168 Tex. Crim. 102, 323 S.W.2d 443 (1959)
338. *Slater v. State*, 166 Tex. Crim. 66, 317 S.W.2d 203 (1958)
339. *White v. State*, 165 Tex. Crim. 339, 306 S.W.2d 903 (1957)[13]
340. *Shaver v. State*, 165 Tex. Crim. 276, 306 S.W.2d 128 (1957)
341. *Lamkin v. State*, 165 Tex. Crim. 11, 301 S.W.2d 922 (1957)
342. *Hall v. State*, 164 Tex. Crim. 573, 301 S.W.2d 161 (1957)
343. *McGowen v. State*, 163 Tex. Crim. 587, 290 S.W.2d 520 (1956)
344. *Webb v. State*, 163 Tex. Crim. 392, 291 S.W.2d 331 (1956)
345. *Bingham v. State*, 163 Tex. Crim. 353, 290 S.W.2d 915 (1956)
346. *Washington v. State*, 162 Tex. Crim. 479, 286 S.W.2d 629 (1956)

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[13]No facts stated as to which of two co-defendants killed the victim.

347. *Walker v. State*, 162 Tex. Crim. 408, 286 S.W.2d 144 (1956)
348. *Farrar v. State*, 162 Tex. Crim. 136, 277 S.W.2d 114 (1955)
349. *Ellisor v. State*, 162 Tex. Crim. 117, 282 S.W.2d 393 (1955)
350. *Meyer v. State*, 160 Tex. Crim. 521, 276 S.W.2d 286 (1954)
351. *Brown v. State*, 160 Tex. Crim. 150, 267 S.W.2d 819 (1954)

UTAH

352. *State v. Gilmore*, (Cr. No. 6405, 4th Jud. Dist., 1976)
353. *State v. Kirkham*, 7 Utah 2d 108, 319 P.2d 859 (1958)
354. *State v. Neal*, 123 Utah 93, 254 P.2d 1053 (1953)
355. *State v. Braasch*, 119 Utah 450, 229 P.2d 289 (1951)
356. *State v. Sullivan*, 119 Utah 450, 229 P.2d 289 (1951)

VIRGINIA

357. *Fuller v. Commonwealth*, 201 Va. 724, 113 S.E.2d 667 (1960)

WASHINGTON

358. *State v. Self*, 59 Wash. 2d 62, 366 P.2d 193 (1961)

359. *State v. Collins*, 50 Wash. 2d 740, 314 P.2d 660 (1957)
360. *State v. Farley*, 48 Wash. 2d 11, 290 P.2d 987 (1955)

WEST VIRGINIA

361. *State v. Brunner*, 143 W. Va. 755, 105 S.E.2d 140 (1958)

WYOMING

362. *Pixley v. State*, 406 P.2d 662 (Wyoming 1965)

Addendum

363. *McVeigh v. State*, 73 So. 2d 694 (Fla. 1954)